

**Schnadig Corporation and Upholsterers' International Union of North America, AFL-CIO and Susan Brooks and Thomas Muensterman.** Cases 25-CA-12579, 25-CA-12606, 25-CA-13036, 25-CA-13092, 25-CA-13165-2, 25-RC-7503, 25-CA-13165, and 25-CA-13165-3

October 19, 1982

## DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND  
MEMBERS JENKINS AND ZIMMERMAN

On September 20, 1981, Administrative Law Judge Marion C. Ladwig issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> of the Administrative Law Judge. We also adopt the Administrative Law Judge's remedy, but we will modify two aspects of it.

1. The Administrative Law Judge found that Respondent's duty to bargain arose on July 31, 1980, and thus it violated Section 8(a)(5) and (1) of the Act when it made unilateral changes in working conditions after that date. These changes affected job bidding, the seniority and layoff system, recall policy, absentee policy, and the wage structure. As a remedy, he recommended that Respondent be ordered to cease and desist from making those unilateral changes, and, upon request of the Union, to revert to the working conditions as they existed prior to the changes.

<sup>1</sup> Respondent contends that certain of the Administrative Law Judge's actions, such as questioning witnesses, and his credibility resolutions stem from bias. We find no merit in this contention. There is no basis for finding that bias existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *N.L.R.B. v. Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Moreover, it is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the credibility resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings or rulings.

Chairman Van de Water and Member Hunter find it unnecessary to rely on the Administrative Law Judge's citation of *TRW Bearing Division*, 257 NLRB 442 (1981), in sec. II,B,7, par. 4, of his Decision.

<sup>2</sup> The General Counsel did not file an exception to the Administrative Law Judge's recommendation in sec. II,B,2, par. 1, of his Decision, that the allegation that Supervisor David Williams told an employee not to solicit on behalf of the Union during "working hours," be dismissed.

We adopt the Administrative Law Judge's remedy for these violations with one modification. Respondent's new wage structure became effective on January 1, 1981, and it is very likely that Respondent has hired some employees since then. Presumably, those employees are being compensated pursuant to the new wage structure.<sup>3</sup> In order to remedy fully Respondent's unfair labor practice, we will order Respondent to make whole any employee who has received wages lower than those he would have received if Respondent had not changed the wage structure.

2. The Administrative Law Judge also found that Respondent violated Section 8(a)(5) and (1) when it laid off a total of 47 employees between December 5, 1980, and March 12, 1981, without affording the Union an opportunity to bargain concerning layoffs. As a remedy, he recommended that Respondent offer reinstatement to the laid-off employees, dismissing, if necessary, persons hired after December 5, and place the balance of the laid-off employees on a preferential hiring list in accordance with the seniority system in effect before Respondent unilaterally changed that system on October 31, 1980. He did not, however, recommend that laid-off employees be reimbursed with backpay, reasoning that this was not appropriate in light of the fact that Respondent had been incurring large financial losses. The Administrative Law Judge acknowledged that counsel for the General Counsel was not seeking a backpay remedy for the laid-off employees.

We will modify this aspect of the Administrative Law Judge's recommended remedy so that employees who were unlawfully laid off are eligible for backpay. Initially, we emphasize that whether counsel for the General Counsel seeks a backpay remedy is immaterial since we have full authority over the remedial aspects of our decisions. See, e.g., *Loray Corporation*, 184 NLRB 577 (1970); *N.L.R.B. v. Duncan Foundry & Machine Workers, Inc.*, 435 F.2d 612 (7th Cir. 1979); *N.L.R.B. v. WTVJ, Inc.*, 268 F.2d 346 (5th Cir. 1959). In finding that backpay may be due to certain laid-off employees, the issue is not merely whether Respondent was justified in laying off the precise number of employees that it did. (Although, as noted by the Administrative Law Judge, Respondent did hire new employees during the period it was effectuating the layoffs.) The more critical point is that Respondent's unlawful conduct directly affected *who* would be selected for layoff. If Respondent had adhered to the seniority system in effect prior to Oc-

<sup>3</sup> Employees working at the time of the unilateral change were not affected.

tober 31, 1980, different employees might have been laid off, while some of the laid-off employees might have been retained. We can discern no reason why we should not afford a remedy to any employees victimized by Respondent's unlawful conduct. Accordingly, Respondent's obligation to reinstate laid-off employees and its backpay liability should be determined at a compliance proceeding. *Wellman Industries, Inc.*, 222 NLRB 204 (1976), enf'd. in an unpublished opinion 94 LRRM 2947 (D.C. Cir. 1977).

Our dissenting colleague suggests breaking new and dangerous ground by making a respondent's ability to pay a factor in determining what, if any, remedy to impose for violations of the Act. Aside from opening a Pandora's box of litigation, we find no support in the Act for the proposition that a remedial order should be tempered based on a wrongdoer's financial situation. As we have stated, employees have suffered financial loss as a result of Respondent's refusal to honor its obligations under the Act—obligations the Chairman acknowledges and joins in finding. We decline to establish a policy that places the financial burden on innocent victims rather than on a violator of the Act because of implications that a remedy may have for Respondent's fiscal well-being.

If Respondent is, in fact, unable to meet its backpay liabilities currently, that is a matter to be addressed in compliance. Although the Board seldom has occasion to comment upon it, arrangements frequently are made to provide a schedule of payments for respondents that are able to demonstrate an inability to shoulder their backpay liabilities. We continue to believe that a compliance proceeding is the appropriate forum for consideration of such concerns.

We will issue an Order, in lieu of that recommended by the Administrative Law Judge, that incorporates these two modifications.<sup>4</sup> Backpay shall be computed in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>5</sup>

### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Schnadig Corporation, Henderson, Kentucky, its officers, agents, successors, and assigns, shall:

#### 1. Cease and desist from:

(a) Discharging, laying off, refusing to recall, or otherwise discriminating against any employee for supporting Upholsterers' International Union of North America, AFL-CIO, or any other union.

(b) Denying employees wage increases because of their union activities.

(c) Giving any suspension or written warning, or placing a disciplinary warning in any employee's file, because of the employee's union activity.

(d) Threatening to close the plant in reprisal if the employees vote for union representation.

(e) Coercively interrogating employees about union support or union activities.

(f) Creating the impression that employees' union activities are under surveillance.

(g) Promising any employee a promotion for opposing a union.

(h) Soliciting grievances from employees and explicitly or implicitly promising to remedy or adjust them in order to induce employees to oppose a union.

(i) Maintaining any rule prohibiting union solicitation during lunch, break periods, and other non-working time.

(j) Maintaining any rule prohibiting the distribution of union literature on company premises in nonworking areas.

(k) Refusing to recognize and bargain collectively regarding wages, hours, and other terms and conditions of employment with Upholsterers' International Union of North America, AFL-CIO, as the exclusive representative of the employees in the following appropriate unit:

All production and maintenance employees of the Employer at its Henderson, Kentucky facility, including all plant clerical employees, the shipping clerk, the stores clerk, the janitor/sweeper, the truckdriver and the lead person in the finishing department; but excluding all engineering department employees, the engineering clerk, the sample shop trainee, the pattern maker, the jigs/fixtures maker, the tool grinder, all office clerical employees, the typist/receptionist, the engineering clerk, the inventory control clerk, the payroll clerk, the production control clerk, the draftsman, the general clerk-senior, the draftsman routings, all inspectors, all professional employees and all supervisors as defined in the Act.

(l) Unilaterally changing job bidding, seniority, the absentee and attendance program, or other working conditions, without bargaining with the Union as the collective-bargaining representative of the employees in the above-described unit.

<sup>4</sup> The Administrative Law Judge inadvertently omitted from the cease-and-desist portion of his recommended Order a paragraph ordering Respondent to refrain from refusing to bargain with the Union. The new Order also corrects this and other minor errors.

<sup>5</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

(m) Unilaterally changing the layoff rules and laying off employees without bargaining with the Union as the collective-bargaining representative of the employees in the above-described unit.

(n) Unilaterally changing the wage scale, grades, and ranges without bargaining with the Union as the collective-bargaining representative of the employees in the above-described unit.

(o) Unilaterally conditioning the recall of laid-off employees upon their acceptance of illegal changes in wages or working conditions.

(p) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain with the above-named Union as the exclusive representative of the employees in the above-described appropriate unit, and, if an understanding is reached, embody such understanding in a signed contract.

(b) Upon request of the Union, restore the job-bidding procedures, seniority system, and the absentee and attendance program which were in effect before October 31, 1980, and the wage scale, grades, and ranges which were in effect before January 1, 1981.

(c) Make whole, with interest, employees who have suffered monetary losses by reason of the unilateral institution of a new wage structure on January 1, 1981, in the manner set forth herein.

(d) Offer William Adams, Jr., Susan Brooks, Richard Conder, Thomas Muensterman, and Mary Stevens immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the Administrative Law Judge's Decision.

(e) Recall all other bargaining unit employees laid off on or after December 5, 1980, at their former rates of pay, dismissing, if necessary, persons hired after that date. If sufficient jobs are not available, place the remaining laid-off employees on a preferential hiring list doing so, at the request of the Union, in accordance with the seniority system in effect before October 31, 1980, and offer them employment before any other persons are hired.

(f) Make whole, with interest, any employee for any loss of pay or other benefits he may have suffered by reason of the changes in the seniority

system instituted on October 31, 1980, in the manner set forth herein.

(g) Expunge from its files any reference to disciplinary warnings and suspensions given William Adams, Jr., and Richard Conder in November and December 1980.

(h) Expunge from its files any reference to the discharge of Thomas Muensterman, on November 20, 1980, and to the discharge of William Adams, Jr., on March 2, 1980, and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel actions against them.

(i) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(j) Post at its plant in Henderson, Kentucky, and mail to all employees laid off on and since December 5, 1980, copies of the attached notice marked "Appendix."<sup>8</sup> Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(k) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

IT IS FURTHER ORDERED that the election conducted on October 1, 1980, in Case 25-RC-7503 be set aside and that the petition be dismissed.

CHAIRMAN VAN DE WATER, dissenting in part:

I dissent because I do not think that the Board should expand upon the Administrative Law Judge's remedy regarding the unlawful change in the wage structure and the unlawful layoffs.

<sup>8</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The record indicates that Respondent has been incurring large financial losses in the operation of its plant. In order to stanch this hemorrhaging, Respondent adopted a new wage structure, which provided for lower wages to be paid to employees hired after January 1, 1981, and was forced to lay off over 40 employees. My colleagues affirm the Administrative Law Judge's finding that Respondent violated Section 8(a)(5) and (1) when it did not bargain with the Union regarding the change in the wage structure and the layoffs. I agree that these are violations. As a remedy, the Administrative Law Judge recommended that Respondent be ordered to cease and desist from failing to bargain over changes in the wage structure and layoffs. He also recommended that the laid-off employees be reinstated if possible, and, if not, that their names be placed on a preferential hiring list so that they can be reinstated as soon as that is feasible. Counsel for the General Counsel stated at the hearing that she was not seeking an award of backpay for the laid-off employees, nor did she file exceptions to the Administrative Law Judge's recommended remedy.

I am in total agreement with my colleagues that we have full authority over remedying unfair labor practices, irrespective of the position of the General Counsel. This principle, however, is beside the point. The real issue here is how sweeping our remedial order ought to be.<sup>7</sup> Respondent claims that it is in dire financial straits. The record reflects this. The General Counsel concurs. The Administrative Law Judge tailored his remedy with Respondent's precarious financial situation in mind. I therefore think that my colleagues are being precipitous and unrealistic in saddling Respondent with a potentially very large backpay liability. We can be and should be more flexible in fashioning a remedy. "In devising all our affirmative orders . . . we bear in mind that the remedy should be appropriate to the particular situation requiring redress, and should be tempered by practical considerations." *Cities Service Oil Company*, 158 NLRB 1204, 1207 (1966). It would be a tragedy, particularly for Respondent's employees, if the Board's backpay award impaired Respondent's ability to operate.

<sup>7</sup> Contrary to the majority I am not relying on Respondent's ability to pay as a factor in determining the remedy. Rather it is a recognition that economic circumstances would have required a reduction in force whether or not there was bargaining. The majority's remedy thus becomes punitive while it goes without saying that our statute is remedial in purpose. Making Respondent pay backpay when admittedly economic circumstances, not union animus, motivated the reductions is a clear application of a punitive remedy and results in an inflexible application of our usual rules for a technical violation of the Act.

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT discharge, lay off, refuse to recall, or otherwise discriminate against any of you for supporting Upholsterers' International Union of North America, AFL-CIO, or any other union.

WE WILL NOT deny any of you a wage increase because of your union activity.

WE WILL NOT suspend or give a written warning to you or place any disciplinary warning memo in your file because of your union activity.

WE WILL NOT threaten to close the plant in reprisal if you vote for union representation.

WE WILL NOT coercively interrogate you about union support or activities.

WE WILL NOT give you the impression that your union activities are under surveillance.

WE WILL NOT promise to promote you if you oppose a union.

WE WILL NOT solicit your grievances and promise to remedy or adjust them to induce you to oppose a union.

WE WILL NOT maintain any rule prohibiting union solicitation during lunch, break periods, and other nonworking time.

WE WILL NOT maintain any rule prohibiting the distribution of union literature on company premises in nonworking areas.

WE WILL NOT refuse to recognize and bargain collectively regarding wages, hours, and other terms and conditions of employment with Upholsterers' International Union of North America, AFL-CIO, as the exclusive representative of the employees in the following appropriate unit:

All production and maintenance employees of the Employer at its Henderson, Kentucky facility, including all plant clerical employ-

ees, the shipping clerk, the stores clerk, the janitor/sweeper, the truckdriver and the lead person in the finishing department; but excluding all engineering department employees, the engineering clerk, the sample shop trainee, the pattern makers, the jigs/fixtures maker, the tool grinder, all office clerical employees, the typist/receptionist, the engineering clerk, the inventory control clerk, the payroll clerk, the production control clerk, the draftsman, the general clerk-senior, the draftsman routings, all inspectors, all professional employees and all supervisors as defined in the Act.

WE WILL NOT change your bidding, seniority, absentee and attendance rules, or other working conditions without bargaining with the Union.

WE WILL NOT change the layoff rules and lay you off without bargaining with the Union.

WE WILL NOT change the wage scale, grades, and ranges without bargaining with the Union.

WE WILL NOT unilaterally condition the recall of laid-off employees upon their acceptance of illegal changes in wages or working conditions.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of the employees in the above-described appropriate unit, and, if an understanding is reached, embody such understanding in a signed contract.

WE WILL, upon request of the Union, restore the job bidding procedures, seniority system, and the absentee and attendance program which were in effect before October 31, 1980, and the wage scale, grades, and ranges which were in effect before January 1, 1981.

WE WILL make whole, with interest, employees who have suffered monetary losses by reason of the unilateral institution of a new wage structure on January 1, 1981.

WE WILL offer William Adams, Jr., Susan Brooks, Richard Conder, Thomas Muensterman, and Mary Stevens immediate and full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits re-

sulting from their discharge, less any net interim earnings, plus interest.

WE WILL recall all bargaining unit employees laid off on or after December 5, 1980, at their former rates of pay, dismissing, if necessary, persons hired after that date; if sufficient jobs are not available, WE WILL place the remaining laid-off employees on a preferential hiring list doing so, at the request of the Union, in accordance with the seniority system in effect before October 31, 1980, and offer them employment before any other persons are hired.

WE WILL make whole, with interest, any employee for any loss of pay or other benefits he may have suffered by reason of the changes in the seniority system instituted on October 31, 1980.

WE WILL expunge from our records all references to disciplinary warnings and suspensions given to William Adams, Jr., and Richard Conder in November and December 1980.

WE WILL expunge from our files any reference to the discharge of Thomas Muensterman, on November 20, 1980, and to the discharge of William Adams, Jr., on March 2, 1980, and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel actions against them.

#### SCHNADIG CORPORATION

#### DECISION

#### STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge: These consolidated cases were heard at Evansville, Indiana, March 30-31 and April 1-2 and 28-30, 1981.<sup>1</sup> The charges were filed September 3, January 12 and 24 (amended February 25), February 17, and March 26. Consolidated complaints were issued October 24 (amended March 20 and at the hearing), February 26 (amended March 4 and 20), March 20 (corrected March 23), and April 16.

These cases primarily involve whether the Company, the Respondent, (a) before the election destroyed the Union's majority support by threatening to close the plant and engaging in other coercive conduct, (b) after the election continued to undermine the union support by unlawfully discharging two union organizers and "laying off" two others whom it failed to recall when hiring new employees, and (c) unlawfully refused to bargain while preventing a fair election, necessitating a bar-

<sup>1</sup> All dates are from May 1980 until April 1981 unless otherwise indicated.

gaining order, in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

In the representation case, the petition was filed August 4 and an election (directed by the Regional Director) was conducted October 1. Excluding 3 challenged ballots, the vote was 51 for and 74 against union representation. Timely objections were filed by the Union. On November 25, the Regional Director issued an order (clarified February 20) consolidating the representation and complaint cases and referring the representation case to the Board. The issues in the representation case are whether an alleged violation of the *Excelsior* rule and the Union's other objections "insofar as they are alleged as unfair labor practices" warrant setting aside the election. [*Excelsior Underwear Inc.*, 156 NLRB 1236 (1966).]

Upon the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Company, I make the following:

#### FINDINGS OF FACT

##### I. JURISDICTION

The Company, a Delaware corporation, manufactures tables, cabinets, and related products at its facility in Henderson, Kentucky, where it annually ships goods valued in excess of \$50,000 directly to points outside the State. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

###### A. Background

The Company, which owns seven union plants manufacturing upholstered furniture, purchased the nonunion table manufacturing plant in Henderson in June 1979. The following May, the Union began an organizing drive. On July 31, when the Union represented a majority of the 126 production and maintenance employees (having obtained 70 valid union authorization cards, 6 more than required for a majority, as discussed later), the Company refused the Union's bargaining demand. (G.C. Exh. 9.)

During the election campaign the Company emphasized its heavy financial losses at the plant, and various representatives of management are alleged to have made threats that the Company would close the plant if the Union were selected to represent the employees. A major question facing the employees at the election was whether the Company would close the plant in reprisal. Foreman Danny Stone acknowledged that "There were numerous rumors . . . the plant was going to shut down," and that, in his conversations with employees,

they would usually ask "if the plant was going to close down."

After the Union's defeat in the October 1 election (by a margin of 23 votes, 51-to-74) and the filing of union objections, the Company discharged 2 union organizers, and "laid off" 2 others and another union supporter whom it failed to recall when hiring new employees. The Company made a number of unilateral changes, including a reduction in wages, and failed to notify or give the Union the opportunity to bargain about the changes and about these and other layoffs, taking the position that it had no obligation to bargain with the Union.

##### B. Alleged Conduct Before the Election

###### 1. Threats of plant closure

###### a. Threat by Foreman Williams

Sometime in June or July, as hand sander Bertha Jewell credibly testified, Foreman David Williams was making the rounds, talking to each of the employees in the department. After giving the Company's arguments against the Union, "he went on to tell me that rather than to see the plant under a union right now, that [Board Chairman Lawrence] Schnadig *could* close the plant down to keep it from happening." (Emphasis supplied.) Williams testified that "We had the same spiel that we had . . . to give to each employee," but he denied telling Jewell anything about closing the plant down, because "We were given do's and don'ts" by the people who "were aiding us in . . . trying to keep the union out . . . and that was one you didn't do." Jewell impressed me as being an honest witness who had a clear recollection of the conversation. I credit her account of what was said and discredit the denial. I find that Williams' statement to her was at least an implied threat of plant closure and violated Section 8(a)(1) of the Act.

Williams revealed on cross-examination that the Company was aware the employees were asking questions "about the plant being shut down if the union won." He testified that he was sure there were such questions and that "They all wondered what would happen." He testified that all he could say was "I don't know. I don't know what the outcome will be." He added, "This is what we were instructed to say . . . Sure, the employees were concerned—most definitely concerned." Thus the Company was aware that the employees feared it would close the plant in reprisal if they voted for the Union, but the Company did nothing to dispel the fear.

###### b. Threat by Foreman Gunther

One day in early September, when final assembler Brenda Hoggard heard rumors of a plant shutdown and of the foremen having a meeting concerning the Union, she asked Foreman James Gunther if he had been to the meeting and "if he thought they would shut the plant down if the union were voted in." As she credibly testified, "he said yes that he thought they would." When asked by company counsel if he recalled Hoggard coming up to him after a foremen's meeting and asking him if the Union got in, would the Company close the

<sup>2</sup> The General Counsel's and Company's unopposed motions to correct the transcript, both dated June 26, 1981, are granted and received in evidence as G.C. Exh. 59 and Resp. Exh. 30.

place down, Gunther answered that he did not recall those words and did not think she asked him that. On cross-examination Gunther denied that Hoggard ever asked him what he thought the outcome would be if the Union won the election. He did not appear to be a candid witness. I discredit the denials and find that his answer concerning a plant shutdown if the Union were voted in tended to be coercive and violated Section 8(a)(1) of the Act.

The evidence is clear that, during its campaign against the Union, the Company continued to emphasize its financial losses while doing nothing to dispel the employees' fear of a plant closure in reprisal for selecting the Union. As revealed by Gunther, "They had a big poster and showed each month what they had lost, and of course the employees were worried."

*c. Alleged threat by Foreman Puckett*

The first complaint alleges that Foreman Chester Puckett, about September 23, threatened "employees that the facility would be closed if the Union were selected to represent them." The only supporting evidence is the testimony of press operator Thomas Muensterman who recalled having a conversation on the subject with Puckett but who did not appear to have a recollection of the words Puckett used in this conversation. I therefore find this allegation must be dismissed.

*d. Threat by Consultant Reinhold*

About September 17 Consultant Arthur Reinhold, speaking on behalf of the Company, met with employees in groups of about 20 and spoke without notes. As he testified, he told the employees that he had hired two of the best managers, Plant Manager Joseph Tunstall and Plant Superintendent John Gerred, to "straighten the mess out" after the prior plant management had "done a very poor job" and lost a great deal of money. He told them that unfortunately at that time they were going through the election campaign "and we had to get through it somehow or another and go on to better things." Although he did not explicitly threaten closure of the plant if the Union were selected to represent the employees, he implied from his prior experience with two unionized plants that this would be the result. As credibly testified by finish repairman Hubert Condor, who attended one of the meetings, Reinhold told that group of employees that he himself had owned seven plants at one time, that "he didn't have any outside help to help him run those and didn't need any to help him run this one," and that "two of them [were] union and that he had closed one and sold one."

As contended by the General Counsel, these remarks were made in the context of an organizational campaign "when rumors and threats of plant closure were rampant, and spoken by the person who possessed the power to effect decisions concerning the plant's future." I find that, in this context, Reinhold's remarks about getting through the election campaign somehow to go on to "better things," not needing any outside help in running his own plants before, not needing any help in running this plant, and having closed one of his two union plants

and selling the other, were an implied threat of a company decision to close the plant if it became union. I therefore find that the remarks tended to be coercive and violated Section 8(a)(1) the Act.

*e. Threat by Board Chairman Schnadig*

On September 22, Board Chairman Lawrence Schnadig spoke to all of the employees in a meeting. While discussing the Union's organizing effort he made it clear that he had purchased the Glenwood plant in Henderson as a nonunion plant and that he *expected it to stay non-union*. He then alluded to a possible closing of the plant, stating that Schnadig Corporation was *in the table business to stay* and that hopefully, with the employees' help, the Company would stay in Henderson, "but *if not here, somewhere else*." (Emphasis supplied.) He gave no assurances that he would not close the plant in reprisal if they voted for the Union—as supervisors had expressed the opinion that he or the Company could or would do and as Consultant Reinhold had implied would happen.

Schnadig, who impressed me as being a credible witness, reconstructed his speech from index cards (Resp. Exh. 21) which he had used and gave the following account. He recalled stating that "Many people have talked to you," specifically mentioning Reinhold, "but you might want to hear from the guy who owns the place." In his speech he told the employees that he decided to go into the table business in 1978 and looked for a year before choosing the Glenwood plant. He said that since then the Company had proved two things: first, it could design and sell quality tables, but, second, it could not manufacture them at a profit, but at a "huge loss." He said the Company had attracted all good people to work there, but the "poor planning" by inexperienced plant management had "prevented you from accomplishing what both you and [we] wanted to do." He stated that the Company had therefore reorganized; that Reinhold, who had been a very successful table manufacturer before his retirement, was changed from adviser to "boss" of the table operations; and that Reinhold had searched and found Tunstall and Gerred two of the best managers in the business. Schnadig then said that the new managers needed the employees' help, and began talking about the "intense union organizing effort." He stated that Glenwood's being nonunion was "a factor in our choice," that nearly all of their competitors were nonunion, and "*We want and expect to stay nonunion*." (Emphasis supplied.) He said that neither the union organizers nor the Company could promise them a job, that the Company could promise them an opportunity, "but it's no good unless we can make Henderson profitable and we can't do that without your help," doing not just what they are asked to do but making helpful and constructive suggestions. He then gave "A word about the future of the Schnadig Corporation and the table business." He stated, "*We're in the table business to stay. Hopefully, with your help in Henderson, but if not here, somewhere else*." (Emphasis supplied.) He later added, "A union at this time can't help us or you and will probably make our success more difficult." He asked for a year to make the Henderson plant successful, and said he wanted

them to vote no on choosing a union "because we don't believe it is good either for the company or for your future. However, this is a free country. And *you can do as you like, but you're also intelligent people* and shouldn't go for a snow job. I've told you the truth" and he hoped they believed it. (Emphasis supplied.) Giving the Company the benefit of any doubt, I accept this version for purposes of ruling on the opposing contentions.

The Company contends in its brief that there was no threat of plant closure, arguing that Board Chairman Schnadig detailed the tremendous losses, described the steps taken to turn around the business, and "candidly conveyed to the employees his intent to stay in the table business, preferably without a union." But Schnadig went much further. After pointing out that he had purchased a nonunion plant and "We . . . expect to stay nonunion," Schnadig stated, "We're in the table business to stay. Hopefully, with your help in Henderson, but if not here, somewhere else." He was clearly implying that if the Company could not stay nonunion in Henderson, as he expected to do, the Company's table business would not stay there but go elsewhere.

The Company also argues that Schnadig "explained to the employees that it was his *opinion* that a union would not be good for the future of either the employees or Schnadig Corporation but that it was a free country and the employees were entitled to do as they saw fit." But again, Schnadig went further. He, speaking as the owner, had just stated he expected to stay nonunion, before stating that he did not believe a union was "good . . . for your future." He then stated that "this is a free country" and that "you can do as you like," however, adding, "but you're also intelligent people" and should not believe the Union's snow job because "I've told you the truth and hope you believe it." In effect he was telling the employees that they were intelligent enough to take his warning, that he intended to stay nonunion at the Henderson plant, and that he was calling upon them to help keep it that way; otherwise the Company would stay in the table business, not in Henderson but "somewhere else."

Schnadig gave the employees no reason for the Company being unable, under the new management, to operate the plant successfully with a union as the Company was operating its seven union upholstery plants. On cross-examination he testified that about 80 percent of the upholstery industry had gone south, where at least 90 percent were nonunion. He thought he would have more flexibility in a nonunion shop, but when asked whether he thought the Henderson plant could survive with a union, he answered that there was not always unanimity of opinion in management, "I would say I probably thought we could survive. We've survived in the upholstery business."

Citing *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), the Company argues in its brief, "The First Amendment to the Constitution and Section 8(c) of the Act specifically protects an employer's right to make known to employees his general views about unionism or any of his specific views about a particular union." It further argues, "This is exactly what Mr. Schnadig did in his speech," pointing out the uncontested loss of money.

However, *Gissel* further teaches that the prediction of plant closure "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control"; that "If there is any implication that an employer may . . . take action solely on his own initiative for reasons unrelated to economic necessity . . . the statement is . . . a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment"; and further, that "[c]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof." *Id.* at 618-619.

It is clear that when Schnadig alluded to the Company staying in the table business hopefully in Henderson, "but if not here, somewhere else," he was not carefully phrasing the reference to plant closing "on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." To the contrary, he had just stated in the speech that he chose a nonunion plant and "We . . . expect to stay nonunion," implying a "threat of retaliation" if the employees voted for a union.

Past statements by representatives of management had already spread alarm among the employees that the Company would close the plant in reprisal if the employees voted in a union. Schnadig's speech undoubtedly tended to increase these fears a few days before the October 1 election, in which the Company overcame the Union's majority and won by a 23-vote margin (excluding 3 challenged ballots).

Under these circumstances I find that Board Chairman Schnadig's September 22 speech was coercive and violated Section 8(a)(1) of the Act.

## 2. Other alleged threats

The first complaint alleges that Quality Control Foreman David Williams threatened employees with discharge if they supported the Union. In the middle of June, shortly after Richard Theriac (then a roving inspector) became the principal union organizer, Williams invited Theriac into his office and said (as Theriac credibly testified) "that he had heard I had been going through the plant talking about the Union. He said it was all right to talk about the Union, because that was my right but I wasn't allowed to do it on working hours, or stop anybody from working." Theriac promised not to do that and, referring to soliciting while working, said, "I had not been going through the plant during working hours discussing the Union." It was then that Williams said "something to the effect about being careful because he didn't want to lose me." I find that Williams was merely cautioning Theriac about soliciting while he was working. I therefore find that this allegation must be dismissed.

The complaint also alleges that Foremen Chester Puckett and Danny Stone threatened employees with the discontinuance of pay raises if they selected the Union to

represent them. I find that these allegations also must be dismissed because of lack of evidence to support them.

### 3. Interrogation

About the middle of June, as finish repairman Hubert Conder credibly testified, Production Manager Ken Martin went to Conder's work station and stood, watching him. Conder asked what Martin had on his mind and Martin said, "union activities. . . . I have . . . some questions I would like to ask you." Conder told Martin to wait, "I have got something that I want to tell you." Conder said he had been a supervisor at Glenwood when the Union tried to get in before, that he had been accused of working for the Union, and that was a lie. Martin asked him, "Did someone ask you to sign a union card?" Conder said yes; Martin asked if it was at lunch or on the job, and Conder said at lunch. Martin later asked, "Was this Jim Hall that asked you to sign this card?" Conder said no, and refused to tell him. (I discredit Martin's denial that he asked Conder questions about the Union.) Martin gave Conder no legitimate purpose for asking the questions and, despite Conder's expressed concern about accusations of his involvement, Martin gave him no assurances against reprisals. I find that the interrogation tended to be coercive in the exercise of employee Section 7 rights and violated Section 8(a)(1) of the Act. I also find, as alleged, that the questioning of Conder about the organizing activity of Hall created the impression that the employees' union activities were under surveillance, further violating Section 8(a)(1) of the Act.

Contrary to the denials by Assembly Room Foreman James Gunther that he ever asked any employees about the Union or about their union activities, several employees credibly testified that he did engage in such interrogation. In September or late August, after employee Rhonda Bell signed a union authorization card, Gunther came to her work station, asked whom she was for, and asked if another employee (Charlene Dusek) was for the Union. Bell answered that she was not for the Union and denied knowing if Dusek was. In mid-September, after employee Michelle Knott had signed a card, Gunther came to her work station, talked against the Union, and "asked me if anybody had ever [given] me a union card," and "if I signed it." She admitted being given a card, but untruthfully denied signing it. Also in mid-September, Gunther went to employee Gregory Hope's work station and said, "Greg I have been going around asking people how they feel about the Union." Hope responded for himself, stating, "Jim I don't rightly know right now" (although he had previously signed a union card). Then Gunther asked, "Greg do you think we could whip it like we did the last time . . . . And I said I don't know." I discredit Gunther's claim that Hope said, "we will whip it like we did two years ago." (As indicated above, Gunther did not impress me as being a candid witness.) Likewise after employee Brenda Hoggard had signed a union card, Gunther went to her work station and asked what she thought about a union at the plant. She untruthfully answered, "I never really thought about it." Hoggard later signed, at her work station, an antiunion paper being circulated (G.C. Exh. 33) and wrote a vote-

no button because she did not want to be in disfavor with Gunther, her foreman. Gunther gave no lawful reason for asking these employees questions about the union activities and sympathies, and did not give any of them any assurances against reprisals. I find that the interrogation tended to coerce employees in the exercise of their Section 7 rights and violated Section 8(a)(1) of the Act.

Having found these repeated instances of coercive interrogation, I do not deem it necessary to rule on other allegations of interrogation.

### 4. Promise of promotion

About the first week of September, as credibly testified to by employee Theriac (who impressed me favorably as an honest witness), Foreman Puckett invited me to step outside the plant to talk for a couple of minutes. Puckett asked him if he would be interested in talking about the second-shift foreman's job, and stated that "if the second shift wasn't continued, I would be brought back on the first shift as a foreman." Theriac said he would be very interested, but then Puckett added, "If you'll take off your [U.I.U. union] hat . . . to help us to defeat the Union, I am pretty sure we can get you this job." Being the leading union organizer, Theriac "told him to forget it because I wasn't taking my hat off." I discredit Puckett's claim that it was Theriac who mentioned taking off the U.I.U. hat "if he should decide to take the job." (Puckett did not impress me as being a candid witness.) I find it clear that this promise of a promotion if the employee would contribute to the defeat of the Union in the election violated Section 8(a)(1) as alleged.

### 5. Denial of wage increase

In September when supply room clerk William Adams, Jr. (one of the Union's voluntary organizers who was later discharged), requested his annual raise, Material Control Administrator Steve Montgomery raised two objections: first, "we can't give you a raise right now because if we do [before the election], the Union might view that as bribery," and, second, "I don't know if that annual evaluation [is] based on your anniversary date or for the fiscal year." Adams said it should not necessarily be considered bribery because he believed he was due an annual raise, and that he thought he was entitled to it on his anniversary date (September 24, G.C. Exh. 32). Montgomery said, "I'll check and get back to you."

I find that the General Counsel has not shown that the Company would have given Adams the annual raise at that time in the absence of the union activity and the pending election. (Adams' later request for the raise, after the election, is discussed below.)

### 6. Solicited grievances

After making the coercive, plant-closure speech on September 22, Board Chairman Schnadig toured the plant, talking to the employees. When he reached employee Susan Brooks' work station, as she credibly testified, he "asked me my name and asked me if there was anything that he could do for me." This was in the pres-

ence of employee Fay Francis who was not called to corroborate or deny it. (Schnadig recalled saying only "Hello," or "How are you doing?" but Brooks appeared to have a clear recollection of the words he used.) "We asked him for rubber mats to go down the line because of our feet hurting," and because Francis' legs and back were hurting. "He told us that he would see what he could do for us." Later Schnadig returned with Plant Manager Joseph Tunstall and suggested that Brooks tell him what they wanted. Brooks did, and Tunstall asked the type and dimensions they wanted. After the discussion, Tunstall "said he would see what he could do." Schnadig recalled telling Tunstall "if there is anything that you can do to help her poor little feet, on this very hard concrete floor, I thought maybe you can do it." The mats were never provided.

I find that by soliciting the employee's grievances on September 22 (9 days before the election) and by making at least an implied promise to remedy the complaint she raised, the Company violated Section 8(a)(1) of the Act. *Reliance Electric Company, Madison Plant Mechanical Drive Division*, 191 NLRB 44 (1971), enf'd. 457 F.2d 503 (6th Cir. 1972).

#### 7. No-solicitation and no-distribution rule

The Company's corporate plant rules, which were posted on the plant's bulletin boards and distributed to the employees in August 1979 and thereafter given to new employees as they were hired contained rule 31 which prohibited:

Solicitation of any kind *during working hours*, or collecting contributions for any purpose, or distributing literature of any kind *on Company premises* or Company time without specific prior approval of the General Manager. [Emphasis supplied.]

The rule remained unchanged throughout the organizing and election campaign. It was not changed until a new rule (G.C. Exh. 21) was promulgated after the October 24 complaint was issued, several weeks after the election.

Rule 31 obviously contains an overly broad no-solicitation rule, prohibiting union solicitation "during working hours" without either limiting the prohibition to the time the employees were actually working or stating that it does not apply to nonworking lunchtime or breaktime. (The no-distribution part of rule 31 is discussed later.)

In *Essex International, Inc.*, 211 NLRB 749, 750 (1974) (Chairman Miller and Member Kennedy; Member Penello concurring; Members Fanning and Jenkins dissenting), a distinction was made between valid no-solicitation rules during "working time" and invalid "working hours" rules which, "unless their impact on lunch and breaktime is clarified," unduly restrict employees' rights to engage in union solicitation during their nonworking time. The majority opinion held that "a rule prohibiting solicitation during 'working hours' is *prima facie* susceptible of the interpretation that solicitation is prohibited during all business hours and, thus, invalid," but that the employer could cure the ambiguity by showing through extrinsic evidence that "the 'working hours' rule was communicated or applied in such a way as to convey an

intent clearly to permit solicitation during breaktime or other periods when employees are not actively at work." *Ibid.* Member Penello, concurring, agreed with the distinction but set forth in his separate opinion "what I believe an employer must do in order to satisfy his obligation to clarify rules which make reference to the term 'working hours.'" He indicated he was unwilling to consider such subjective considerations as employee understanding of a rule in determining its validity, but "will require that the clarification of a facially invalid rule must come from the employer alone, either by a *written or an oral explanation to all employees*." (Emphasis supplied.) He explained, "Any other course would place an employee in the position of having to test the rule in order to determine its application. Such a course, in my opinion, would inhibit employees and restrict their rights . . . to engage in union solicitation . . . during their *non-working time*." *Id.* at 751-752. Although dissenting to a distinction being made between "working time" and "working hours" rules, Members Fanning and Jenkins joined with Member Penello (making a three-member majority) in requiring more than subjective considerations of employee understanding. They stated in their dissenting opinion that an employer who does not intend that a rule include "all time from the beginning to end of a work shift including paid breaktime, lunchtime, and cleanup time" can "easily incorporate in the statement of the rule a disclaimer that the restriction on organizational activities is intended to apply to such time. His failure to do so necessarily imposes on employees the risk of violating the rule if they engage in such activities during such times that rule may not lawfully, but arguably does, reach. Imposing such risk upon employees is itself an interference with their exercise of Section 7 rights." *Id.* at 753. (I note that recently in *T.R.W. Bearings Division*, 257 NLRB 442 (1981), the Board held that "rules prohibiting employees from engaging in solicitation during 'work time,' or 'working time,' without further clarification, are, like rules prohibiting such activity during 'working hours,' presumptively invalid," overruling *Essex International* to that extent.)

In the present case, the Company decided to strictly enforce rule 31 insofar as it applied to union solicitation during actual working time, but not to enforce it during the 30-minute lunch period and the 10-minute morning and afternoon breaks. Thus, Foreman Puckett testified that, in applying rule 31, nobody could do any soliciting "on the hours they were supposed to be at the work station," but could on "their breaktime, lunchtime, before and after work." However the Company did not clarify the rule, either verbally or in writing, to advise all employees that the no-solicitation rule 31 was confined to time the employees were actually working, or that the rule—which had been distributed and posted on the bulletin board—permitted soliciting for the Union during lunch and breaks.

Meanwhile, the Company was carrying on a vigorous, one-on-one, antiunion campaign during working time. As testified by Foreman David Williams, "It was difficult to try to do the job and make the rounds and get all this done . . . because there was a certain amount of infor-

mation that we were trying to get across [to the employees], to each one each day." Except for discussing the Union, there admittedly was no rule against the employees talking on the job as long as it did not interfere with work. Foreman Danny Stone testified that "As long as my people stay productive I don't care what they talk about," but that the employees in all departments were not permitted to talk about the Union during working time. (The General Counsel argues in his brief that the no-solicitation rule "was discriminatorily enforced." However, the first complaint alleges only that the overly broad no-solicitation rule was promulgated and maintained. There was no allegation of discriminatory enforcement and I find that issue is not before me.)

It is well established that "The mere existence of an overly broad rule tends to restrain and interfere with employees' rights under the Act even if not enforced," *Staco, Inc.*, 244 NLRB 461, 469 (1979), and that the rule's mere existence tends to "inhibit the union activities of conscientious minded employees," *Custom Trim Products*, 255 NLRB 787 (1981). Moreover, I infer that the Company's maintenance of the overly broad no-solicitation rule 31, prohibiting union solicitation "during working hours" for the entire period of the election campaign without the impact of the rule on lunch and breacktime being clarified, while at the same time carrying on its antiunion campaign during working time, had a severe adverse effect, inhibiting the employees in the exercise of their Section 7 rights. I therefore find, as alleged in the first complaint, that the Company coercively maintained the overly broad no-solicitation rule in violation of Section 8(a)(1) of the Act.

Concerning the no-distribution part of rule 31, it was overly broad inasmuch as it prohibited the distribution of union literature on company premises without prior approval of the general manager. Although the Company did generally permit employees who ignored the rule to pass out union literature on the Company's premises without permission, it did not announce verbally or in writing that the rule was rescinded or that they were entitled to exercise this right. I find that the Company, by maintaining the overly broad no-distribution rule throughout the election campaign, coerced the employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act, even though the rule was generally not enforced against those willing to ignore it. *Custom Trim Products, supra*.

There was one occasion, on September 22, when one of the supervisors restricted the distribution of union literature on the plant premises, outside the timeclock door entrance. It is undisputed, as assembler Darlene Baker credibly testified, that before work on that date Finishing Room Foreman Robert Bloyd stuck his head out the door and told her not to pass out the union leaflets (G.C. Exh. 18) there, "that not even a nonunion employee could pass out any leaflets there, they had to be 18 feet away from the factory." At the time, the Company was passing out much of its literature in the working area during working time, yet it was objecting to Baker passing out union literature on her own time on company premises where a large number of employees could be reached when they were entering the plant. Baker left

the company sidewalk and went to the end of the driveway, but then returned when told by the U.I.U. general organizer that Bloyd had acted unlawfully. Later that morning when she told Bloyd he had violated Federal law, he did not retract what he had told her but said, "Yeah, that's what lawyers are for," and anyway, "Remember I asked you to move, I didn't tell you." I find that Bloyd's conduct (which he did not retract) in having her move from the company premises outside the plant entrance tended to be coercive in the exercise of employee Section 7 rights, and violated Section 8(a)(1) of the Act.

#### 8. Other alleged coercive conduct

The first complaint alleges that the Company discriminatorily restricted employee Loyal Poore to his work station and other employees to their departments unless they had permission to leave the area or department. However, one of the above-mentioned corporate plant rules, which had been posted and distributed to the employees, was rule 28 which prohibited "Leaving department or work station . . . without prior permission of supervisor." (G.C. Exh. 5.) The evidence supports the Company's defense that "A number of Mill Room employees, particularly Loyal Poore, were disregarding this rule and had been observed by the production manager, Ken Martin, wandering around the plant when they should have been in the mill room working." One of the mill room employees, press operator Muensterman, frankly informed Plant Manager Tunstall in a conversation before the election that there was a problem with employees "running around talking and not doing their job." I agree with the Company that it did not violate the Act by reminding employees, individually and in a group meeting, of the obligation to comply with the reasonable rule designed to ensure satisfactory production. I therefore find that these allegations must be dismissed.

The complaint also alleges that a total of five supervisors, on various occasions in August and September, "kept under surveillance" the employees' union activities. These allegations refer to the supervisors' watching the employees distribute union literature. However the evidence shows merely that the supervisors were observing the open, public distribution of both prounion and antiunion literature outside the plant. There is no evidence that any of them took any notes or made any lists. The Board had held that "[u]nion representatives and employees who choose to engage in their union activities at the Employer's premises should have no cause to complain that management observes them." *Porta Systems Corporation*, 238 NLRB 192 (1978). I therefore agree with the Company that its conduct did not constitute illegal surveillance, and find that these allegations must be dismissed.

The complaint further alleges that Foreman Gunther "gave antiunion literature to an employee to distribute to the Respondent's employees." Although denied by Gunther, the credible evidence shows that Gunther was seen giving some antiunion literature (G.C. Exh. 16) to employee Deborah Brown in the office, and that she thereafter began distributing it with employee Anna Bloyd,

the wife of Foreman Bloyd, at the plant entrance. However the evidence does not reveal whose idea it was to distribute the literature, who prepared it, or whether there was any coercion involved. Under these circumstances, I find that the General Counsel has failed to prove that there was any interference with the exercise of employee Section 7 rights. I therefore find that the allegation must be dismissed.

#### 9. Alleged discriminatory discharge of Rick Poore

There is a direct conflict in the testimony concerning the circumstances of mill room employee Rick Poore's discharge on August 1.

According to Mill Room Foreman Chester Puckett, about 9 a.m. he assigned Poore the cutting of two curio shelves at a time on the DeWalt radial arm saw, without the assistance of an off-bearer. About an hour later he noticed that Poore was cutting one board at a time; "I told him we needed to cut two boards. It's not that hard and we need more production." Poore said he was tired, and "I told him if he couldn't cut two boards, I'd get somebody else to cut two boards and he said that he could." Shortly after lunch, about 12:15, he again observed Poore cutting one board. He said, "you're going to have to run two boards because we need the production." About 1:15 Poore was again cutting one board at a time and Puckett said, "I can't work you like this. . . . they cut two boards last night, and I've got to have two boards cut . . . I've got a schedule to meet." Poore responded, "Hell, I'm tired." Puckett said he was tired too, "I want you to get your card and I'll get your check and I'll get somebody that can run the job efficiently." Poore asked if he was fired; Puckett said yes; Poore said, "if you just let me stay I'll go ahead and run it. . . . I can run as much as anybody can;" but Puckett said it was too late, "I'd already given him enough time." Puckett then assigned another operator to cut the shelves, for the rest of the day without an off-bearer and with an off-bearer the following day.

According to Poore, however, he was cutting two boards from the time he was assigned until he was summarily discharged about 1:45 p.m. He testified that he asked two or three times for an off-bearer, that Puckett said no, and that, although he was cutting two boards the entire time, Puckett came back to the job and said "You're fired." Poore asked why and Puckett said "you should cut two boards at a time," which he said he did.

Poore and his father, Loyal Poore, actively assisted employee Theriac in the union organizing campaign, and the Company was aware of his union support. The day after Poore's discharge, as Theriac credibly testified, Theriac told Puckett "you got two men doing the job you had Rick doing," and Puckett said, "I know." Theriac asked, "Don't you think you are leaving yourself wide open?" or something to that effect, and Puckett responded, "Yeah I am but that is the way they want it."

The General Counsel contends that the alleged cause for Poore's discharge was a pretext, and that Poore was in fact discharged because of his union activities to quell the tide of union activity springing from the mill room. The Company contends that Poore's discharge was unrelated to any union activities and resulted solely

from his failure to follow the instructions of his supervisor.

Although I cannot credit much of Foreman Puckett's testimony (particularly his claim, contrary to other credited testimony, "We seldom have an off-bearer on the radial arm saw" when cutting two boards), I do not believe Poore's testimony that he was cutting two boards the entire time that day. It does not ring true that if he had been, Puckett would have summarily discharged him, accusing him of cutting single boards. I therefore discredit that part of Poore's testimony as being a fabrication. It appears that Puckett's statement to Theriac the following day, that he realized the assigning of the work to two employees was leaving himself wide open (to a discrimination charge) but "that is the way they want it," raises considerable suspicion about his motivation for discharging the union organizer. I find, however, that the comment is sufficiently ambiguous not to be conclusive and that the General Counsel has failed to make a *prima facie* case that the discharge was discriminatorily motivated. I therefore find that the allegation of discriminatory discharge must be dismissed.

#### C. Alleged Conduct After the Election

##### 1. The circumstances

On October 2, the day after the election, Plant Manager Tunstall held an employee meeting and announced a number of unilateral changes in working conditions at the plant. On October 7, the Union filed timely objections to the election.

It soon became apparent that the Company was concerned about winning a second election if the first election were set aside.

On Friday, October 10, Foreman Gunther had a final conversation with employee Brenda Hoggard who had been notified that week that she was being recalled to her former job at Whirlpool in Evansville (across the river from the Henderson plant). She is the employee whom Gunther had coercively interrogated and threatened with plant closure, as found above. She had expressed to Gunther her dislike for driving across the bridge in the wintertime.

Indicating the Company's concern about the election, Gunther went to where she was taking a smoking break outside the plant entrance. It is undisputed that "He asked me would it be all right if he kept my name . . . on the employment records for two or three days longer," explaining "he didn't know for sure but something might come up over the vote." (That Friday, October 10, was her last day at work. I note that the company records (G.C. Exh. 32) reflect that Hoggard "Quit 10/12/80," 2 days later as Gunther mentioned.) As he further credibly testified, Gunther "mentioned a vote" and "asked me would I come back to vote, if they should hold another one." It is obvious that the Company was seeking a "no" vote. As found above, Hoggard has signed a union authorization card, but before the election she had signed an antiunion paper and had begun wearing a vote-no button.

It is in this setting that I first consider the allegations that the Company thereafter discriminatorily laid off and/or discharged four of the voluntary organizers on the Union's in-plant organizing committee and one other union supporter.

## 2. Discharge of union organizers

### a. Thomas Muensterman

On three occasions in September, high frequency press operator Muensterman had rebutted the efforts of Plant Manager Tunstall and Foreman Puckett to persuade him to forsake his union organizing and be on the Company's "team." Muensterman was not only on the circulated list of voluntary organizers (G.C. Exh. 10), but he also was wearing a U.I.U. hat and passing out union literature almost daily at the time.

Earlier that summer Puckett had awarded Muensterman the operator job over several other bidders because (in Puckett's words) "He was a very conscientious worker, he showed a lot of ability," and "I thought he would be the right man" for the high production job. Muensterman (who had had 1-1/2 years of college) had proved to be a good operator. He had never been disciplined, and Puckett testified that he had never done any bad work before.

Before Muensterman's discharge on November 20, as he credibly testified, he and the other press operator, Willie Hannebauer, had been having trouble running chipboard tabletops and both had been complaining to Puckett. The presses apply pressure to the corners of the tabletops (shaped like a picture frame), and apply an electrical charge to speed dry the glue in the joints. One of the problems was that the corners were fitted with dowel pins, and some of the dowel holes (cut on an old Bell miter drill saw which had to be adjusted "constantly" were misaligned, resulting in corners not being flush. Puckett had replaced the rubber mallets, previously used by the two operators, with heavier steel hammers to assist them in smoothing the corners; but in using the heavier hammers, both operators had cracked some of the tabletops. On November 19, when he and Puckett were discussing the problems, Muensterman mentioned to Puckett that Hannebauer (who had 18 years of experience and who was operating a larger press) had also been cracking some of the tops. (Hannebauer did not testify.)

Early the next morning, November 20, Muensterman was having the same problem again with the misaligned dowel holes. As he credibly testified, "Mr. Puckett walked up to me and he said if you can't run the machine any better than this we'll get someone else to run the machine and I said *it sounds like a great idea to me.*" (Emphasis supplied.) He proceeded to tell Puckett about the misalignment problem, because "We had 5000 [tabletops] we had to get out by the end of the month." But Puckett told him, "Go home," and escorted him out of the building. Muensterman was "pretty frustrated" the next day about what had happened and took the day off. When he went for his check the following day and asked if he was fired, he was given two paychecks, indicating that he was. (The Company attacks Muensterman's

credibility, but he impressed me by his demeanor on the stand as being a most conscientious witness, doing his best to recount accurately what happened.)

I do not believe Foreman Puckett's account. He claimed that there had not been any problems with the dowel pins fitting properly; that Muensterman had produced 40 tops an hour the day before but only 12 tops in 1.4 hours that morning (whereas Muensterman credibly testified that he had been averaging 60 to 80 tabletops a day); that Muensterman had not mentioned a problem with dowel pins the day before; and that he was never aware of operator Hannebauer cracking any tabletops.

According to Puckett, he asked Muensterman that morning if he was having problems and Muensterman said he did not want to tear the tops up. "I told him I didn't want him to tear them up but I wanted him to build some and if he couldn't do it, I would get somebody that could." Puckett then claimed, "He threw his hammer into the press [credibly denied by Muensterman] and told me to get someone. I said okay you're fired, get out of the way I will get somebody else." Later Puckett claimed that Muensterman "said that is all I am going to do and he threw the hammer into the press." When asked why he discharged Muensterman, he claimed, "For throwing the hammer in the press and saying get someone else because I am not going to build anymore." (I note that the company records reflect that Muensterman "Quit 11/20/80" (G.C. Exh. 32).)

Based on all the evidence and circumstances, I find that the Company was looking for pretexts for discharging the union organizers to assure a victory in any rerun election, and that Foreman Puckett seized upon Muensterman's response (that "it sounds like a great idea" to get someone else to run the machine) as such a pretext. I further find that Puckett fabricated the claims that Muensterman threw the hammer into the press and that he refused to build any more tabletops, in an endeavor to conceal the discriminatory motivation for discharging him. I therefore find that the stated reasons for the discharge were pretexts and that the Company discriminatorily discharged Muensterman on November 20 to discourage union membership in violation of Section 8(a)(3) and (1) of the Act, as alleged in the April 16 complaint.

The Company contends in its brief that the piecemeal manner in which the pleadings were issued in this case caused such confusion that it was not given fair notice of the issues to be litigated, and that therefore the entire case should be dismissed. This contention obviously has no merit. The Respondent carefully answered the allegations, despite the fact that they were contained in separate documents.

### b. William Adams, Jr.

#### (1) His union activity

It was common knowledge that supply room clerk Adams was one of the strongest union supporters at the plant, as testified by Material Control Administrator Steve Montgomery. He continued his union support after the election.

In addition to being a voluntary organizer on the Union's organizing committee, Adams was a witness for the Union at the hearing in the representation case and one of the union observers at the election. He handed out and collected union authorization cards and distributed union literature. He wore a U.I.U. hat, and began in late June or early July wearing a union T-shirt daily. After the election he continued supporting the Union, wearing the union T-shirt bearing the message, "Be Wise, Organize."

#### (2) Denial of wage increase

On October 3, the second day after the election, Adams again asked his supervisor, Montgomery, for the annual raise which he claimed was due on his anniversary date (September 24) and which Montgomery had promised to check on, as discussed above. This time Montgomery raised no objection other than the union activity and election. As Adams credibly testified, he asked, "Now that the election is over, what about my raise?" Montgomery responded, "Things are pretty much the way they were . . . the voting [is] yet to be certified. And so we are still pretty much the same as we were." Similarly Montgomery testified that when Adams mentioned the raise after the election, "I told him again that until the election was certified, we couldn't do anything because it could be misconstrued and be used against us."

The General Counsel contends that the Company refused to award the benefit solely because of the election campaign and violated Section 8(a)(1) and (3) of the Act. The Company contends that Adams was not entitled to the annual raise because he had not been in his position for the entire year (having become the supply room clerk in May) and because of his absenteeism. I find the Company's contentions to be afterthoughts. Montgomery said nothing about such an interpretation of the Company's wage policy (G.C. Exh. 48), at the time and, contrary to Montgomery's discredited claim, he had never mentioned Adams' absenteeism in connection with the annual increase. I agree with the General Counsel and find that the Company's October 3 denial of Adams' scheduled annual wage increase, solely because of the employees' union activity in seeking recognition of the Union through the election, violated Section 8(a)(3) and (1) of the Act.

I note that Foreman Puckett testified that one of the employees in a departmental meeting in his office asked about a raise, and that he said "as long as there is a union campaign, there won't be any raises for anybody." The General Counsel's brief contends that telling employees they are being denied a wage increase solely for that reason is coercive and violates Section 8(a)(1) of the Act. However such an allegation was not made in any of the complaints, and I find that that issue is not before me.

#### (3) His discharge

On October 22 Adams had an unexcused absence, his first since he became a supply room clerk in May. On October 24 his supervisor, Montgomery, gave him a written warning for excessive absenteeism. Although he had only one unexcused absence since May 1, he had a

total of 14 excused absences during that period of time. (Adams' personnel file contained notes or slips (G.C. Exh. 56) from a lawyer for appearance in court, from his doctor for illnesses of himself, his wife, and his daughter, and from the hospital.) On October 30, Montgomery gave him his 15th excused absence, for tests at the hospital and doctor's treatment. I find that the General Counsel has failed to prove that the October 24 disciplinary warning was unlawfully motivated.

Bruce Williams, the former acting plant manager, became Adams' supervisor on November 3. The next day, November 4, Adams was absent 4.5 hours. When he arrived at the plant with a slip from his doctor, he explained to Williams he had tried to correct his attendance but this was something unexpected. As Adams credibly testified, Williams "said my absenteeism had to be corrected," that Adams' excuses had always been good in the past, but "even good excuses turn bad after a while." Adams agreed to try to correct the attendance problem.

After this conversation, Adams' attendance sharply improved. As testified by Williams, in the next 4 months (from November 4 to March 2) he found no fault with Adams' attendance except for his absences on December 11 and February 25. On both occasions Adams was ill: on December 11 from an adverse reaction from a penicillin shot, and on February 25 when he was too sick to come to work.

As credibly testified by Adams, who impressed me as being an honest witness, he and Williams "talked on a casual type basis" when he returned to work on December 12. Williams asked what was wrong with him yesterday, and he said he was sick from the penicillin shot. Williams asked about his part-time job (working a maximum of 35 hours a month on apartment maintenance) and said Adams had been looking pretty tired the day before. Williams again cautioned him about his absenteeism and said it was not acceptable. Adams positively denied ever telling Williams he had been too tired to come to work. He was also positive that Williams "never said I would be dismissed," but "just said any of my excuses were not any good."

Between that time and Adams' next unexcused absence 2-1/2 months later, Plant Manager Tunstall and Foreman Stone had decided to hire new employees rather than recall two other union organizers who had been "laid off," as discussed below.

Beginning the last week in January, the plant went on a 4-day week, and the plant was closed the entire second week of February. It was during this slow period when Adams was next ill on Wednesday, February 25. He called in about 6:45 a.m. and left a message for Williams that he was sick and that if he felt better by noon he would come in. The next day Williams asked him where he was, "And I told him I was home sick and he didn't ask if I had gone to the doctor, I just told him I did not go to the doctor, but I had had a refill on a prescription I had got prior to that, and that was all that was said about it."

The plant was closed again that Friday. At quitting time Monday, March 2, Williams called Adams to the

office and said "since you missed Wednesday . . . I am sorry I [have] to fire you." Williams said he had done a good job when he was there but "nobody does a good job when they're not here." Williams did not give him a discharge slip, and said nothing about having previously given him a final warning or having placed any disciplinary memos in his file.

#### (4) The Company's defenses

When called as a defense witness to explain his reasons for discharging Adams, Material Control Administrator Williams relied on two memos which he had placed in Adams' file, but he did not testify when he had placed them there. The General Counsel contends that the first one, dated November 2 (G.C. Exh. 55b), was a fabrication. I agree, and find that it was written and inserted in Adams' file at some later date. Williams positively testified that he had a conversation with Adams on that date, but Williams had recalled the wrong date whenever he wrote the memo. November 2 was a Sunday, when the plant was closed.

I find that the December 12 memo (G.C. Exh. 55c) was also fabricated. It states that Williams talked to Adams on December 12 about the December 11 absence, that "he explained he was working another job in the evenings (part time) and he was so tired he could not make it in," and concluded: "In view of Bill's past record I told him he would be dismissed the next time he had an unexcused absence." (Emphasis supplied.) Thus, according to this defense, Adams had given Williams a too-tired-from-other-job excuse for missing work on December 11 without being fired at once, and Williams had placed a final warning in the file without giving Adams a copy. Williams testified that Adams said "he was just too tired to come to work because he was working another job and worked late on it, and I just said no more *unexcused* absences or you're discharged." (Emphasis supplied.) Williams did not impress me favorably as a witness and I discredit this testimony.

Williams claimed on the stand that he did not recall any discussion with Adams on Thursday, February 26, about his February 25 absence, although the discharge slip (G.C. Exh. 54), whenever it was prepared, stated that Adams "returned the following day & said he was sick but did not have a Doctors excuse." Williams testified that he waited until Monday to discharge Adams because Plant Manager Tunstall was out of town Thursday. Finally he answered, "Absolutely," when asked by company attorney Schiff: "And it's your testimony that during your previous discussions with Bill prior to his February 25 absence, that you had explained to him that *any more absences* would result in his dismissal?" Williams appeared willing to give whatever testimony would help the Company's cause.

I do not doubt Williams' testimony that he waited until Monday to get Plant Manager Tunstall's approval to discharge Adams. (Tunstall was also involved in the December 5 "layoff" of two other union organizers, Conder and Brooks, and he had been personally rebuffed by union organizer Muensterman before Muensterman's discharge.) However, Williams knew that Adams was sick and had not gone to a doctor; Williams did not ask

to see the prescription refill; Adams had sharply improved his attendance; and 2-1/2 months had elapsed since Adams missed work because of the adverse reaction to penicillin. It was under these circumstances that I find the Company fabricated the final warning memo for Adams' file, without offering any explanation for not giving him a copy. I further find that the Company seized upon Adams' absence as a pretext, and discriminatorily discharged him to continue ridding the plant of the union organizers to assure a victory in any rerun election. I therefore find that the March 2 discharge, and the placing of the spurious November 2 and December 12 disciplinary memos in his file, violated Section 8(a)(3) and (1) of the Act.

#### 3. "Layoff" of union organizers and supporter

##### a. *Layoff or discharge*

Because of slow business, Plant Manager Tunstall decided to lay off employees on December 5. In the packing department where six employees were included in the layoff, Tunstall and Packing and Shipping Foreman Stone decided to "lay off," out of order of seniority, the two remaining union organizers in that department, upfitter Richard Conder and packer and upfitter Susan Brooks, and a union supporter, repair parts filler and glass packer Mary Stevens. I note that about a week before the election, Stone had indicated his concern about the union organizing in his department. He told Stevens "that it looked bad [for] him because almost all of his employees had signed a union card. Two other employees in that department had been union organizers, James Hall and Micheal Baker (G.C. Exh. 10), but they were no longer employed. (The company records show that Hall quit October 30 and Baker was discharged September 4 (G.C. Exh. 32).) Since the layoff, the Company hired five new employees in the packing department, on February 3, 5, 17, and 25 and March 2, but it did not recall Conder, Brooks, or Stevens.

On December 5 the three employees were told they were being laid off. The evidence is clear, however, that the Company had no intention of ever recalling them.

The evidence discloses that the Company made an unannounced decision not to recall the laid-off employees, while at the same time making a maneuver which, in connection with a wage reduction, would enable it to claim that it believed the laid-off employees would not want to return to work. Adopting the "1981 Rate Scale" (G.C. Exh. 42), effective January 1 (replacing the old wage scale and grades), the Company changed wages, placing the job titles in seven instead of five wage grades. (The rate ranges for the lowest two grades were reduced, In grade 1 from \$3.78-\$4.62 to \$3.35-\$3.65 and in grade 2 from \$3.93-\$5.31 to \$3.65-\$4.05, and the rate range for the highest grade was changed from \$4.30-\$8 for the old grade 5 to \$6-\$6.80 for the new grade VII.) The Company then took the action to justify its not recalling the laid-off employees. It permitted all of the employees then on the payroll to retain their current wage rates unchanged, but it decided that the laid-off organizer and union supporter must return under the lower

wage scale. It did so, despite Tunstall's admission at one point that if the laid-off employees had a good work record, "we'd be better off to have them than somebody brand new."

Tunstall would not admit that he had decided not to recall the laid-off employees. He testified:

Q. In other words, are these people really laid off, or are they terminated, Mr. Tunstall? The way you talk, I'm not sure.

A. They're laid off—not terminated. . . . It's not that we didn't want to call them back, we felt like they just wouldn't take it—the lower wage.

Foreman Stone was more candid. Having rejected employee Brooks' offer to return at the lower wage, he admitted that the Company had decided not to recall the laid-off employees:

Q. Why did you hire someone new before you recalled Rick Conder to work?

A. Because after conferring with Joe Tunstall as to whether or not we would be calling anyone back we decided that it was probably in our best interest that we did not call any of the people back. We had changed our wage scale and they would be coming back at a much lesser wage.

\* \* \* \* \*

Q. And why was this that you and Mr. Tunstall agreed not to recall any of those people who had been laid off?

A. Because we were trying to get our plant set up with where the people as they come in they would be starting at less money . . . .

However, it is undisputed that he concealed this decision from the laid-off employees at the time. In February, when Brooks went to the plant and inquired a second time about being recalled, she asked Stone why they were hiring new employees "if we were all on laid-off status and hadn't been called back." Concealing the truth from her, he responded that he did not know that they had not been called back. He then claimed "that they were bringing some of them back at minimum wage," and "I told him that if they called me back at minimum wage that I would come back, that it was better than unemployment." Brooks was still not recalled.

I find that the Company was discriminatorily motivated in reducing the wages of Conder, Brooks, and Stevens, then treating them as discharged.

#### b. Richard Conder

Upfitter Conder had rebuffed Foreman Stone's efforts to persuade him to vote for the Company and had instead signed the Union's list of voluntary organizers, distributed union literature in the smoking area of the packing department, passed out union cards, wore a union T-shirt, and since September continued to wear a U.I.U. hat.

It was on September 5 when Stone interrupted Conder and other packing department employees at their work

and passed out Plant Manager Tunstall's September 4 anti-union letter (G.C. Exh. 31, detailing the U.I.U. and local's income and expenses and concluding by asking what the Union could guarantee them for their money "other than dues, fees, assessments, possible strikes and fines?") for them to read before resuming work. While discussing the leaflet with Conder, Stone "asked me what could a union do for me that the company has not already done, that the company [gave] me a job and everything." Instead of being evasive or indicating support for the Company in its one-on-one campaign, Conder responded, "I [will] spend my money any way I want to, it is my money." He later became a voluntary organizer.

It was obvious before December 5 that the Company was laying the groundwork for discharging him, by issuing him a disciplinary warning on November 4 and a 3-day suspension on November 7. At the time, as admitted by Plant Manager Tunstall at the hearing, Packing Foreman Stone "needed all the extra help he could get" to work overtime, upfitting and packing the last contract of curio tables. Stone admittedly would go to other departments and ask for volunteers.

Stone was aware that Conder and his father were riding to work with an employee in another department, and that Conder had no way of getting home if he worked an hour overtime with the other packing department employees unless Stone would permit the driver also to work overtime. (The packing work was unskilled.) Stone was permitting the wife of one packing department employee to work overtime with her husband, in order that she would not have to wait in the office for him before going home together; yet Stone admittedly did not offer an opportunity to work to the driver of the car in which Conder was riding to make it possible for Conder to have a way home, 30 miles away.

Conder explained the situation to Foreman Stone to no avail. Rather than be stranded at the plant without a ride, Conder rode home without working the assigned overtime. Stone wrote him a written warning on November 4, stating that Conder refused the overtime "due to lack of transportation. You are obligated to your job. Transportation is not our problem." On November 7 Stone gave Conder a 3-day suspension, with a "Final warning. Reoccurrence means dismissal." (G.C. Exh. 29.) That Saturday, November 8, Conder's father was able to borrow a car, but Stone refused to permit Conder to work the assigned Saturday overtime because of the suspension (extending the suspension to 4 days).

Conder filed a grievance, complaining about the unfair treatment and the fourth day of the suspension, and stating that "arrangements are made for other car pool employees, for all to work over." Stone took the grievance and returned it the same day with both his and Tunstall's answers. Stone's answer on the grievance stated that Conder "was treated more than fair. He is obligated to his job. This means that if he is needed to work overtime—Transportation is his problem—NOT OURS. Prod. problems schedule overtime. Not employee car pools. His record speaks for itself." (G.C. Exh. 30.) Without giving Conder the opportunity to be heard in a meeting first with the production manager and secondly

with the plant manager, as required in steps 2 and 3 of the Company's grievance procedure (G.C. Exh. 52), Tunstall stated in his written response, "I feel that Mr. Stone had justification for his action with this employee. We do not favor any employees in enforcing our policies & procedures."

After considering all of the circumstances, I find that the Company issued the warning and suspension because of Conder's union activity and to lay the basis for a discriminatory discharge, thereby violating Section 8(a)(3) and (1) of the Act.

When asked why he chose Conder for layoff, Foreman Stone testified, "I had just [gone] through a period of some stiff disciplinary action on Rickey due to his failure of responsibility toward his job obligation. Also I had had a lot of trouble keeping Rick productive, he had a tendency to wander off from his job" and he took a lot of supervision. I find that the first reason was for a discriminatory purpose, and the other purported reasons were mere makeweight, referring to his early employment in the department and his conduct during the election campaign. I therefore find that the Company's selection of Richard Conder for layoff of December 5 and its decision not to recall him were discriminatorily motivated, to rid the plant of another union organizer, and therefore violated Section 8(a)(3) and (1) of the Act.

#### c. Susan Brooks

Voluntary organizer Brooks assisted in the organizing, wore a U.I.U. hat daily, distributed union literature, and served as union observer at the election. At that time she was working in the assembly department under Foreman Gunther, with whom she had an argument when he endeavored to turn her against the Union. This was on August 19, the date of one of Plant Manager Tunstall's antiunion letters (G.C. Exh. 34), accusing the Union of misleading the employees). Gunther gave her a copy while she was working on the assembly line, asked her why she supported a union, and talked against the Union. She argued with him and told him how beneficial a union would be.

About the first or second of November, Brooks was transferred to the packing department where she worked as a packer and upfitter. On December 5, Gunther was shorthanded in the assembly department and Brooks worked there on the line that day. About 3 o'clock she was called to Packing Foreman Stone's office and laid off. As she credibly testified, Stone said he "was told that he had to lay me off," and "that it was not of his choice and if it had been" his choice, "I probably wouldn't" have been.

Claiming at the hearing that he had chosen her for layoff, Stone testified that as he went through her past absentee record "I noted that she had a real bad attendance record and it was based on that that I decided to lay her off." However, he did not mention her attendance at the time of her layoff or at either time when she went to the plant and inquired about when she would be recalled. While working in Gunther's department she had been absent many times in connection with marital problems (visiting her lawyer or attending court in connection with a divorce, restraining order, child support

for a handicapped child, etc.), and had had a number of excused absences for medical care for herself and obtaining assistance for the child. Because Stone admittedly had not raised any attendance problem with her before her layoff and never mentioned her attendance afterwards, I infer that he regarded the causes for her absences to have been largely in the past.

Having found, as credibly testified by Brooks, that Foreman Stone said at the time that he was "told that he had to lay" her off, I infer that Plant Manager Tunstall (who was involved in the decision to discriminatorily discharge or lay off other union organizers) did not merely approve Brooks' layoff (as Tunstall and Stone claimed at the hearing) but was the one who directed Stone to lay this union organizer off along with union organizer Conder. I further find that the Company relied on Brooks' past absenteeism as a pretext for the layoff, despite Stone's preference not to lay her off out of order of seniority. I therefore find that the Company discriminatorily laid Brooks off and refused to recall her because she was a union organizer, in violation of Section 8(a)(3) and (1) of the Act.

#### d. Mary Stevens

Stevens was not a union organizer, but the evidence indicates that during the election campaign she was involved with organizer William Adams in suspected union activity, that the Company knew she had signed a union card, and that it suspected that she was violating the no-solicitation rule in campaigning for the Union while refusing Foreman Stone's request that she join other employees in handing out antiunion leaflets.

In September, when Stone was complaining "that it looked bad [for] him because almost all of his employees had signed a union card," she told him she had signed one "but that wasn't reason that I had to vote for the Union." However, she had not been willing to join in campaigning against the Union. One morning after September 17, Stone asked her to go out to the parking lot and help hand out some hand-written leaflets "and I didn't go out there." (This is not alleged as a separate violation.)

On September 17 Adams (one of the "strongest union supporters" who was discriminatorily discharged March 2, as found above) went to Stevens' work station to read a company leaflet Foreman Stone had passed out and to talk with Stevens about work (regarding some broken glass). Stone saw them talking and suspected that Stevens was violating the no-solicitation rule. Later in the day he called her to the office, said he did not want her and Adams talking, that "he figured that we were talking about the Union and . . . he didn't want us talking union on company time." Adams overheard Stevens tell another employee what Stone had said and filed a grievance, complaining that "Foreman Danny Stone restricted the free and normal line of communications between his packing dept, employees and the storeroom clerk, due to suspected union activity or talk." Although this controversy was soon settled the next day, with Stone explaining to Adams that "as long as it is work related there is no restriction on conversation," I infer that this episode

labeled Stevens as a union supporter, who the Company believed was spending working time campaigning for the Union. (I find that the misunderstanding on Stevens' part does not support the allegation in the first complaint that on September 17 the Company "restricted its employees from talking to their fellow employees.")

At the time of the December 5 layoff, Stevens' services were needed. She was the only repair parts order filler (with the responsibility to ship customers' substitute parts), and her other primary responsibility was packing glass. During the last 2 weeks of her employment, she was unable to fill the orders for repair parts because "they didn't have anyone at that time to pack the glass" and she was working full time doing that. After the layoff the amount of glass packing increased and different employees had been assigned to do her work. Stone himself had been doing part of it.

Stevens had worked under Foreman Stone since they worked together at the plant for Glenwood. (From about 1975 to 1976 she was the packing foreman herself.) It is undisputed that Stone had never disciplined her, but had complimented her. He had told her "that he appreciated what I had done for him," that "I had helped him out a lot because . . . a lot of new people came in that didn't know what they were doing and I would show people what to do," and that "he appreciated how much help that I had given him while he was foreman."

When asked why he selected Stevens for layoff, Foreman Stone testified that "she took an awful lot of supervision to keep her productive," explaining that she "had a habit of wandering off and talking to other people. . . . She would bring a cooler with all types of food. She was constantly over there fixing herself crackers and peanut butter, fixing herself sandwiches and I was always having to go tell Mary wait till break, wait till lunch, Mary stay busy . . . . Eating, wandering off the job, gone to the water fountain, going to the restroom and such." Even if this testimony were not exaggerated, it was largely history. On October 22, Plant Manager Tunstall posted a notice (Resp. Exh. 1) that eating and drinking were not allowed during worktime, and she and other employees had discontinued doing so for 6 weeks before the layoff. The "wandering off and talking to other people" undoubtedly referred to her suspected union activity during the election campaign. Stone did not object to her going about the plant to find the necessary parts, glass, etc., to perform her work. Moreover Stevens, who impressed me as being a candid, honest witness, credibly testified that Stone never talked to her about wandering off the job or not working fast enough. He did talk to her about getting ice from her cooler to make ice water and about having too many drinks, but this was before the October 22 notice was posted. Regarding going to the restroom several times while working, that did happen on one occasion when she was sick.

After weighing all of the evidence concerning Stevens' selection for layoff on December 5, I find that the Company saw the layoffs as an opportunity to eliminate from the payroll an employee who was involved in the September 17 grievance with organizer Adams and who was suspected of joining him in soliciting for the Union. I

find that the reasons Foreman Stone gave for selecting her were pretexts. I therefore find that the Company discriminately laid her off on December 5 and thereafter failed to recall her in its continuing unlawful campaign to defeat the Union, in violation of Section 8(a)(3) and (1) of the Act.

#### *D. Refusal To Bargain*

##### *1. Majority status and refusal*

###### *a. Appropriate unit and cards signed*

The parties agree, and I find, that the following is an appropriate bargaining unit:

All production and maintenance employees of the Employer at its Henderson, Kentucky facility, including all plant clerical employees, the shipping clerk, the stores clerk, the janitor/sweeper, the truckdriver and the lead person in the finishing department; but excluding all engineering department employees, the engineering clerk, the sample shop trainee, the pattern maker, the jigs/fixtures maker, the tool grinder, all office clerical employees, the typist/receptionist, the engineering clerk, the inventory control clerk, the payroll clerk, the production control clerk, the draftsman, the general clerk-senior, the draftsman routings, all inspectors, all professional employees and all supervisors as defined in the Act.

The parties agree that there were 126 employees in the bargaining unit on July 31 (G.C. Exh. 32, excluding Bertha Dusek and Carol Sutton who were hired August 1). By July 31 a total of 70 of the bargaining unit employees (Adams, Darlene Baker, Michael Baker, Barger, Below, Bowley, Brooks, Kenneth Carter, Sr., Carver, Catilla, Clement, Hubert Conder, Richard Conder, Charles Damrath, Charles Dance, DeSpain, Johnny Duncan, Lisa Duncan, Francis, Fruit, Jackie Gibson, Goodlett, Goolsby, Grisham, Dan Grossman, Pamela Grossman, Hall, Hare, Terry Hayden, Gary Hill, Lucille Hill, Hoggard, Howell, Jewell, Johnson, Keeper, Kimberly Knott, Majors, Minton, Jeffrey Monks, Debra Moore, Garry Moore, Morris, Muensterman, Nally, Dianna Oldham, James Oldham, Overton, Page, Phelps, Loyal Poore, Rick Poore, Roybal, David Samsil, Sawyer, Marilyn Shelton, Sylvia Shelton, Betty Skidmore, Louise Skidmore, William Smith, Stevens, Mary Stone, Ronnie Stone, Ada Sutton, Theriac, Utley, Watkins, Wilkerson, Williams, and Wint) had signed union authorization cards. These 70 cards were 6 more than the 64 cards needed for a majority.

All 84 of the cards which were signed, during the period from May 31 through September 29, read at the top (under the name of the Union):

I do hereby designate and authorize the Upholsters' International Union of North America, AFL-CIO, and its representatives to act as my representative for the purpose of collective bargaining in re-

spect to rates of pay, wages, hours of employment and other conditions of employment.

The Supreme Court specifically found in *N.L.R.B. v. Gissel Packing Co., Inc.*, 395 U.S. 575, 606 (1969), that the cards used in *General Steel Products*, 157 NLRB 636, 643 (1966), bearing this identical language, were "single-purpose cards, stating *clearly and unambiguously* on their face that the signer designated the union as his representative." (Emphasis supplied.)

#### b. Contested cards

In an appendix to its brief, the Company contends without explanation that 3 of the 70 cards which the Union had obtained by July 31 were "Union Cards Misrepresented" and should therefore not be counted toward a majority. One of the cards (G.C. Exh. 17-39) was signed on June 11 by operator Wallace Carver who had been promoted to assistant foreman sometime before he testified. When asked by company counsel what he was told when voluntary organizer Theriac gave him the card, Carver said nothing about any kind of fee; but when asked "Did [Theriac] ever say anything to you about initiation fees or union fees?" Carver answered, "It seems to me like he said the ones that sign the card wouldn't have to pay the fee." Thereafter when he was repeatedly asked what Theriac had told him (as in his pretrial affidavit in which he was asked what reason was given for asking him to sign a card), he could not remember Theriac saying anything about a fee. None of the other 75 employees who authenticated their own cards mentioned anything being said about a fee. Carver appeared less than candid when he answered the counsel's question "about initiation fees or union dues." I discredit the testimony as being fabricated, and reject the Company's claim that the card was misrepresented to Carver. I note that Carver apparently had a change of heart before the hearing. At the time he was signing his own card, he was soliciting employee Martha Nally to sign hers (G.C. Exh. 17-40), telling her the plant was in bad shape.

The other two cards which were contested without explanation in the appendix to the Company's brief as misrepresented were signed by Brenda Hoggard (G.C. Exh. 17-72) and Gregory Hope (G.C. Exh. 17-36). Both cards were challenged in the brief itself as cards which had been solicited for the purpose of getting an election, as discussed below. Hope's card, however, is not in issue; it was not signed by July 31, when the Company refused to recognize and bargain with the Union, but was signed on August 6. Hoggard had been laid off by Whirlpool in Evansville, and earlier had stated that she did not think she would go back because she did not like to drive across the bridge to Evansville in the wintertime.

In its brief the Company contends that "At least seven employees [including Hoggard and Hope] testified that when their cards were solicited there was mention made that the purpose of signing a union card was to get an election." The evidence discloses the following: (1) Employee Charles Dance, who identified his card (G.C. Exh. 17-8) as a card to have the Union "represent us in bargaining with the company, testified that he could not

remember exactly what was said to him at the time he signed the card but it was "To have the . . . Union represent us in having an election." (2) Hope's card, as indicated above, is not in issue. (3) As discussed above, leadman Carver gave fabricated testimony about a fee being mentioned when he was given the card. He also claimed, "I believe [Theriac] said he needed all the signed cards he could get in order to hold an election." I consider Carver's testimony too untrustworthy to rely upon it. (4) Employee Kenneth Carter, Sr., testified that when Theriac gave him his card (G.C. Exh. 17-54), Theriac told him it was "so we could get enough signatures or cards to have an election which I already knew that . . . to get the union in, to get an election to bring a union in." (5) Employee William Smith testified that when he signed his card (G.C. Exh. 17-57), he was told "if you get enough cards we would be able to vote for the union," and that there "Would just be an increase in pay." (6) Employee Ronnie Stone testified that when he signed a card (G.C. Exh. 17-68), Theriac "went over everything pretty thoroughly with me . . . that there was no promise that by me signing a card that a union would be in just that we needed the cards to be signed before we could even get a vote. . . . By signing the card that that didn't mean that the union would come in. All that meant was that we possibly would get an election if we got enough of the cards signed." He also testified, "Sure that was the idea of getting the cards" to get a union organized at the plant. (7) Hoggard testified that "As I recall the only thing said about an election, is that they were trying to get a union election . . . to vote in the union," that (reading from her pretrial affidavit) voluntary organizer Loyal "Poore told me that the reason he was asking me to sign a card was to get enough of the cards signed so we could have an election, and that "he said he thought we needed a union and I remember I agreed."

In *Gissel, supra* at 606-608, fn. 27, the Supreme Court specifically approved the Board's *Cumberland* doctrine (*Cumberland Shoe Corporation*, 144 NLRB 1268 (1963), *enfd.* 351 F.2d 917 (6th Cir. 1965)), which was explained and reaffirmed by the Board in *Levi Strauss & Co.*, 172 NLRB 732, 733 (1968), as follows:

Thus the fact that employees are told in the course of solicitation that an election is contemplated, or that a purpose of the card is to make an election possible, provides in our view *insufficient* basis in itself for vitiating unambiguously worded authorization cards on the theory of misrepresentation. A different situation is presented, of course, where union organizers solicit cards on the explicit or indirectly expressed representation that they will use such cards only for an election and subsequently seek to use them for a different purpose; i.e., to establish the Union's majority independently. In such situation the Board invalidates the cards for majority computation because the nature of the representation is such as to induce a conditional delivery for

a restricted purpose and there is apparent fraud when that restriction is exceeded.”<sup>7</sup>

<sup>7</sup> The foregoing does not of course imply that a finding of representation is confined to situations where employees are expressly told *in haec verba* that the “sole” or “only” purpose of the cards is to obtain an election. The Board has never suggested such a mechanistic application of the foregoing principles, as some have contended. The Board looks to the substance rather than to form. It is not the use or nonuse of certain key or “magic” words that is controlling, but whether or not the totality of circumstances surrounding the card solicitation is such as to add up to an assurance to the card signer that his card will be used for no purpose other than to help get an election.

Under this court-approved *Cumberland* doctrine, the totality of the circumstances convinces me that none of the six employees who signed their cards before July 31 did so under what amounted to an assurance that the card would be used for no purpose other than to help get an election. I therefore reject as unfounded the Company’s contention that the cards are invalid because of what the employees were told at the time they signed the cards.

#### c. *Belated contention*

As the organizing campaign progressed, the Union gave the card signers an opportunity to withdraw or cancel their authorization cards if for any reason the employees did not want to authorize the Union to represent them. The Union sent or delivered to each card signer an acknowledgment of receipt of the authorization card, with a small, pocket-size certification card (G.C. Exh. 11) from the U.I.U. president, certifying that the card signer “has indicated a belief in the principles of Collective Bargaining by signing an authorization card” for the Union. None of the union authorization cards were repudiated.

No contention was made until the afternoon of the seventh and last day of the hearing that the employees were unable to understand the union authorization cards when they read and signed them. In the absence of a stipulation that various uncontested cards were authentic, a total of 76 employees and former employees had been called to authenticate their own cards. Not a single one of these card signers who testified that he read the card gave any indication that he was unable to understand the meaning of the card. (It is clear that two employees who could not read and write understood what the card meant: Loyal Poore was one of the active voluntary organizers and Douglas Wilkerson had the card explained to him. Employees Kenneth Carter, Sr., and Roger Keeper, who have difficulty reading, had the card read to them.) I note that on one occasion, on the fourth day of the hearing, the company counsel questioned the reading ability of one former employee, Mary Stone, when she testified that she had no trouble reading although the organizer had completed her card for her after she had read and signed it:

Q. Would you take a look at the card there and tell me if you can read that first line starting with the words I do?

A. I do hereby designate and authorize the Upholsterers’ International Union of North America—  
Q. That is good. . . .

It later developed that when the Company’s last defense witness, on the seventh day of the hearing, produced selected employment applications from the Company’s files (Resp. Exh. 29), Stone’s application was included. It indicated that she “went to the 8th grade.”

On the afternoon of the last day of hearing, after the 76th card signer had testified and left the stand and after it was evident that the Union had obtained authorization cards from a majority of the bargaining unit employees on July 31 (the date the Company claimed a good-faith doubt and refused to bargain), the Company called the proverbial “surprise witness.” He was a local university professor who had majored in education with a specialization in reading and who had a doctor’s degree and impressive credentials. When asked if he had “an opinion with reasonable professional certainty as to the reading level of the language on the face” of the above-quoted authorization card, he testified that all three of the formulas he had used to analyze the document “indicated that the level of difficulty of the material was at the *college or beyond level*.” (Emphasis supplied.)

It appears obvious that this stated “opinion” is absurd, for such plain, clear language.

When explaining how he arrived at such an opinion, he testified that he had used 3 out of 35 to 50 different formulas developed for conducting a statistical analysis of readability level. One factor was the number of difficult words: *union and representatives being at the sixth to eighth grade level, designate and International at the eighth grade level, conditions of employment at the seventh to ninth grade level, authorize and collective at the eighth and ninth grade level, Upholsterers’ at the ninth to tenth grade level, and hereby and collective bargaining being at the ninth to eleventh grade level*. Yet, inasmuch as all these “difficult” words are included in one sentence, with 81 syllables and 43 words, and the difficulty of the material is assessed “in an engineering fashion,” the “readability level analysis would indicate that this is [a] very difficult passage to read and to understand.”

I agree with the General Counsel that “These readability analysis formulas may be an interesting academic exercise, but have no practical application,” at least insofar as predicting whether individual employees during an organizing campaign would understand, upon reading and signing the authorization card, that they were authorizing the Union to represent them. Although the professor impressed me, from his demeanor on the stand, as being a partisan witness doing his best to support the Company’s cause, he did admit at one point upon being questioned by the General Counsel that the test results simply attest “to the level of difficulty of this passage. Now, given an individual, I’m not predicting how many people can or cannot read and understand this card.” Even assuming that his readability level analysis actually came to the conclusion that the union card was at the “college and beyond level,” I find the analysis irrelevant to the issues in this case.

Ignoring the fact that these authorization cards have been found by the Supreme Court to state "clearly and unambiguously on their face that the signer designated the union as his representative," the Company cites instead its "expert testimony that the level of reading difficulty for the language found on the face of the union cards in this case was at or beyond the college level, *plus or minus one grade level* [emphasis supplied]. [Tr. 1306, 1340-1341.]" The reference to the latter transcript pages is to the place where the professor retracted his earlier testimony to the extent that he testified that the "estimate is probably accurate plus or minus one grade level, but at the college level that becomes really unknown. *It could range from high school to college.*" (Emphasis supplied.) The Company then argues, from the employment applications produced by its last witness, that "Few of the employees had any college . . . many hadn't even completed high school," and "Many of these employees did not even complete the tenth grade." It ignores the evidence of how easily the former employee, Mary Stone, who had gone "to" the eighth grade as discussed above, had begun reading the card into evidence until the company counsel stopped her, saying "That is good." It also ignores the evidence that the employee who read and explained the card to employee Keeper (who has trouble reading, as indicated above) was former employee James Johnson who completed only the eighth grade. (Resp. Exh. 29).

The Company argues that "In these circumstances, the General Counsel could not rely on the presumption which normally flows from an employee's authenticated signature on the card to establish a clear intent of authorization. Instead General Counsel bore the burden of proving that each employee who executed a card clearly understood the significance of the document and intended to authorize the Union to represent him."

As authority for this novel position, the Company cites *Brancato Iron Works, Inc.*, 170 NLRB 75, 81 (1968), involving a card which is "completely unintelligible" to the employees because the Italian and Spanish-speaking employees "did not understand a word of print" on the union cards printed in English. The Company argues as follows, omitting any reference to the language barrier except the word "translated" in the last sentence, and also omitting from the quoted paragraph the important first sentence (which I include in brackets), indicating that the paragraph began with the second sentence:

Regarding the General Counsel's burden of proving clear authorization by a majority of unit employees, the Board has explained that:

[At least 10 of the 13 who signed these cards did not understand a word of print.] In an ordinary case the employee's signature placed on a standard union card presumptively establishes his intent to authorize a union to represent him forthwith—for the card so states clearly. When the card is completely unintelligible to the employee, there can be no presumption—a sort of *prima facie* case in favor of the complaint, as it were—that he meant this or that. It would seem that in

such a case something more is required, either by the employee of what was said to him at the time and his understanding of the purpose for signing, or by fellow employees or solicitors of how they translated or explained the card to him before its acceptance in writing.

By omitting these clearly distinguishing factors in the *Brancato* case, the Company is citing that case as authority for its novel position, whereas in fact, the case directly supports the General Counsel's position to the contrary. Thus the case holds, "In an ordinary case the employee's signature placed on a standard union card presumptively establishes his intent to authorize a union to represent him forthwith—for the card so states clearly." Except for the testimony by the professor, the present case is an "ordinary case," the present union card is a "standard union card," and the employee's signature "presumptively establishes his intent to authorize" the Union to represent him because the card so "states clearly" as held by the Supreme Court in *Gissel, supra* at 606.

In the absence of evidence to overcome the presumption, I reject as frivolous the Company contention that 27 of the 70 union authorization cards, because they were signed by employees who were not high school graduates, are invalid.

In view of the above findings that all 70 of the union authorization cards are valid designations of the Union, I conclude that the Union represented a majority of the Company's 126 employees on July 31, 1980.

#### d. Refused demand

The Union on July 29 made a bargaining demand (G.C. Exh. 8) and the Company on July 31 sent its response (G.C. Exh. 9), advising that "we have a good faith doubt that you represent a majority of our employees" and suggesting an election. Having found that the employees who signed the 70 valid union authorization cards constituted a majority of the 126 bargaining unit employees on July 31, I find, in view of the following detailed analysis of the necessity of a bargaining order, that, on and since July 31, the Company violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union. *Trading Port, Inc.*, 219 NLRB 298, 301 (1975).

#### 2. Necessity of bargaining order

In *N.L.R.B. v. Gissel Packing Co.*, *supra*, 395 U.S. 575, 613-615 (1969), the Supreme Court established two categories of cases in which a bargaining order would be appropriate. In category 1 are the "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices of such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be held. In category 2 are "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." The Court held that in these cases, such as this one, where there is a showing that at one point the union had a majority, the

Board can properly take into consideration in fashioning a remedy, "the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds the possibility of erasing the effects of the past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue." I first take into consideration "the extensiveness" of the Company's unfair labor practices "in terms of their past effect on election conditions." *Id.* at 614. The Company denies all of the allegations of unfair labor practices.

*Extensiveness of Violations:* While engaging in other coercive conduct, the Company was carrying on a campaign of fear to undercut the Union's majority support.

Under its inexperienced plant management, the Company was suffering financial losses at the Henderson plant when the Union began its organizational campaign in May. As part of its campaign to defeat the Union, the Company began publicizing and emphasizing its losses by displaying each month a large poster, announcing the amount of the losses. After the Union achieved its majority status in late July, the Company replaced its top management at the plant and took steps "to turn around the business."

It was in this context that the Company carried on a campaign of fear, to make the employees believe that if they voted for union representation, the Company would close the plant in reprisal. Initially it was the individual supervisors who conveyed the threat of plant closure. Thus, while Foreman David Williams was engaged in the supervisors' one-on-one campaign in the plant to publicize the Company's antiunion arguments among the individual employees, he told employee Jewell "that rather than to see the plant under a union right now, that [Board Chairman] Schnadig could close the plant down to keep it from happening." Employee Hoggard, upon hearing rumors of plant shutdown and of a foreman's meeting concerning the Union, asked Foreman Gunther if he had been in the meeting and "if he thought they would shut the plant down if the union were voted in." Gunther added to the employees' fears by answering that "yes he thought they would." As Foreman Williams testified, employees were asking "about the plant being shut down if the union won," and at some time the supervisors were instructed to answer the questions on plant closure by saying, "I don't know. I don't know what the outcome will be."

Thus by the time the top management of the Company visited the plant shortly before the election, the employees were fearful that the Company would close the plant in reprisal if they voted for the Union, and top management was fully cognizant of this fear. Consultant Reinhold, who was then a company official in charge over the plant management, spoke to the employees in groups on September 17 (2 weeks before the October 1 election), telling employees in at least one meeting that he himself had owned seven plants at one time, that two of them were union, and that he had closed one and sold the other. By these and other remarks, he added to the

employees' fear of a company decision to close the plant if it became union. He was followed on September 22 by Board Chairman Schnadig himself, who exacerbated the employees' alarm about plant closure. Schnadig implied in a meeting of all employees that if he could not stay nonunion in Henderson, as he expected to do, the plant would not stay there but go elsewhere, and that they were intelligent enough to heed his warning.

Thus when the employees went to the poll to vote on October 1, they were faced with repeated threats that the Company would close the plant in reprisal, depriving them of their livelihood, if they voted for union representation.

Meanwhile supervisors, in their one-on-one campaign among the employees against the Union, were engaging in coercive interrogation, without informing the employees of any legitimate purpose for the questions and without giving them any assurances against reprisal.

While carrying on this coercive one-on-one campaign among the employees during working time, the Company maintained (until several weeks after the election) an overly broad no-solicitation rule, prohibiting union solicitation "during working hours," and an overly broad no-distribution rule, prohibiting the distribution of union literature "on Company premises . . . without specific prior approval of the General Manager." Instead of rescinding these rules, or notifying all employees that the rules did not apply to their soliciting for the Union at lunch and breaktime or to distributing union literature on company premises during nonworking time, the Company generally did not enforce the rules against those who were willing to ignore them. When an employee tried to reach a large number of employees by passing out union leaflets at the plant entrance (without obstructing the entrance), a supervisor told her not to pass them out there, "that not even a nonunion employee could pass out any leaflets there, they had to be 18 feet away from the factory." The maintenance of the invalid no-solicitation rule while carrying on the antiunion campaign during working time undoubtedly had an adverse effect, inhibiting employees in the exercise of their Section 7 rights.

After Board Chairman Schnadig made the coercive, plant-closure speech, he solicited an employee's grievance, and indicated to her and another employee that he would remedy the complaint (by furnishing rubber mats for the employees to stand on). And, in order to further undercut the Union, Foreman Puckett offered the leading union organizer, Theriac, a foreman's job, provided he would take off his U.I.U. union hat and "help us to defeat the Union."

Thus the Company was seriously interfering with the employees' organizational rights while instilling fear that a union vote would result in the Company closing the plant in reprisal.

The Company contends in its brief, however, that the "Majority support in this case, if any, dissipated from natural attrition such as employee quits, lawful discharges, and other separations from employment. See Appendix A." To the contrary, the Union's majority strength on July 31, of 70 card signers to 56 nonsigners, was undermined by the Company's unlawful campaign to

the point that the Union lost by a margin of 23 votes, 51 votes to 74 votes, while there had been only 9 separations of card signers. (Between July 31 and October 1, there were three discharges (of Michael Baker, Rick Poore, and one not shown in Appendix A, Douglas Wilkerson, see G.C. Exh. 32) and six quits. Of course, it is unknown how the replacements voted.)

In determining the possibility of holding a fair election after the Company's unlawful campaign had such a devastating effect on the Union's majority support, I next consider, in turn, the residual impact of the unfair labor practices, the likelihood of recurring misconduct, and the potential effectiveness of customary remedies. In doing so, I bear in mind that the Board has often emphasized that it prefers to rely upon its own election machinery rather than on authorization cards in testing the majority status of a particular union.

*Residual Impact of Unfair Labor Practices:* The Company has never given the employees any assurances that it would not close the plant in reprisal if they voted for the Union. Instead, it has demonstrated its continued determination to keep the plant nonunion by flouting the Act, discharging two of the union organizers, and discriminatorily laying off two other union organizers and a union supporter, refusing to recall them. I am convinced that the traditional order to cease and desist and an order of reinstatement with backpay, together with a company offer of reinstatement—even assuming the return of the unlawfully terminated employees after many months of litigation—would not successfully eradicate the lingering effects of the Company's misconduct, particularly the threats of plant closure. As recently held in *Viracon, Inc.*, 256 NLRB 245, 247 (1981):

Threats of job loss through plant closure have long been recognized as being serious unfair labor practices having a substantial impact on employee attitudes and reactions and, thus, upon employee free choice. The Supreme Court acknowledged the serious coercive impact of such threats in the *Gissel* decision.<sup>10</sup> The Court moreover noted the serious continuing impact of such threats when it made reference to a study that threats to close or transfer plant operations were more effective in destroying election conditions for a longer period of time than were other types of unfair labor practices.<sup>11</sup>

\* \* \* \* \*

We further find that simply requiring the Employer to refrain from repeating such threats, the traditional remedy, will not erase the effects of this threat and enable the employees to participate in a free and uncoerced rerun election. The threat remains in the employees' memory and its impact lingers long after the utterances have been abated.<sup>12</sup>

<sup>10</sup> *Id.* at 616-620.

<sup>11</sup> *Id.* at 611, fn. 31.

<sup>12</sup> *General Stencils*, 195 NLRB 1109, 1110 (1972).

*Likelihood of Recurring Misconduct:* By the time of the hearing, the Company had demonstrated in a number of

ways that it would resort to whatever illegal means it deemed feasible and necessary to defeat union representation at the plant. It discriminatorily discharged union organizers Muensterman and Adams at the first opportunity for pretextual reasons. To conceal its discriminatory motivation, it fabricated claims that Muensterman threw his hammer into the press and refused to build any more tabletops, and placed a spurious final warning memo in Adams' file. It discriminatorily laid off union organizers Conder and Brooks, as well as employee Stevens because of her suspected union activity with union organizer Adams, all three out of order of seniority. Then it contrived an excuse for not recalling them. Thus, it made an unannounced decision not to recall the laid-off employees, while at the same time making a maneuver which, in connection with a wage reduction, would enable it to claim that it believed the laid-off employees would not want to return to work. It permitted the employees then on the payroll to retain their current wages, but discriminatorily reduced the wages of the laid-off union organizers and union supporter to provide an excuse for not calling them. At the hearing Plant Manager Tunstall falsely testified that "It's not that we didn't want to call [the laid-off employees] back, we felt like they just wouldn't take it—the lower wage," contrary to Foreman Stone's admission on the stand that he and Tunstall had agreed not to recall the laid-off employees.

The Company thus rid the plant of four union organizers and another union supporter in order to assure a victory in any rerun election. After engaging in such continuing violations, the Company could be expected to repeat its misconduct to prevent the plant from being unionized.

*Potential Effectiveness of Customary Remedies:* I find that the Board's traditional remedies, short of a bargaining order, would not convince at least a substantial percentage of the remaining employees that they would be protected from a closure of the plant in reprisal or from discriminatory discharge or layoff if they campaigned and voted for the Union. The remaining employees have observed how the Company is willing to flout the Act by undermining the Union's majority strength, discriminating against union organizers, and resorting to the tactics of failing to recall supposedly "laid off" employees while hiring new employees. After many months without union representation following their organizing drive which was successful at one point, they would have to start organizing afresh. The *status quo ante* would not be restored, and the Company would have succeeded in its unlawful purpose of crushing the employees' organizational efforts.

Under these circumstances I find that even a vigorous and resourceful application of the Board's traditional remedies would not be sufficient to dispel the lingering fear of reprisals for supporting the Union. In fact, such remedies without a bargaining order would as a practical matter be putting both the employees and the Company on notice that the price for engaging in such flagrant violations of the Act, thwarting the employees' majority support of the Union and keeping the plant nonunion, is

potential liability for an unknown amount of backpay, a risk the Company had demonstrated it is willing to take.

*Concluding Findings:* After balancing all of the competing considerations (including the preference for relying on the results of the Board's own elections rather than on union authorization cards), I find that the possibility of erasing the effects of the past unfair labor practices and conducting a fair and meaningful election is slight. I therefore find that the employee sentiment once expressed through the union authorization cards would, on balance, be better protected by the issuance of a bargaining order.

### 3. Unilateral changes after election

#### a. October 31 changes

Before October 31, the job bidding policy at the Henderson plant was contained in the job bidding provisions of the personnel policy manual at the plant (G.C. Exh. 44a, No. 121-21, effective July 1, 1979). The seniority system, as explained by Plant Manager Tunstall, provided for both department and plant seniority in layoffs "and the right to bump someone else." The absenteeism and attendance program was contained in the absenteeism and tardiness provisions of the corporate personnel policy manual (G.C. Exh. 43, No. 703, pp. 1-4, effective December 1, 1979) and in the time off for personal reasons provisions of the personnel policy manual at the plant (G.C. Exh. 51, No. 412-21, effective July 1, 1979).

It is undisputed that Plant Manager Tunstall met with employees October 31 and announced new policies, as shown in his outline for the meeting (Resp. Exh. 13). Tunstall's testimony includes examples of the changes he announced. The job bidding procedure would be replaced with a transfer procedure, with the employee applying to the foreman to be considered. "I . . . just did not believe in that type of a set up for laying off. And I announced at that meeting that our layoff will be based on us trying to keep our plant running efficiently . . ." If an employee is absent 2 days or more a month, he "is subject to some corrective action," but "we will accept doctor's excuses, hospitals and things like that."

It is undisputed that these changes were made unilaterally, without notice to the Union. (Concerning the October 22 notice which the Company posted on the bulletin board to change the smoking areas to comply with insurance company recommendations for eliminating a fire hazard, I find that the General Counsel has failed to prove that, under the circumstances, there was a requirement to bargain or a discriminatory purpose.)

#### b. Layoffs and wage changes

On December 5, because of adverse economic conditions, the Company began laying off a large part of the bargaining unit. Without offering to bargain with the Union, it utilized its new seniority-layoff rules which Plant Manager Tunstall unilaterally announced October 31.

This first group of layoffs on December 5 included, out of order of seniority, union organizers Conder and Brooks and union supporter Stevens, found above to be discriminatory layoffs. A total of 19 employees were laid

off on that date, 3 on December 12, 1 on January 5, 6 on January 16, 1 each on January 19, 20, and 25, 1 on February 12, and 14 on March 12, making a total of 47 employees laid off. During this period of time, the Company hired 11 new employees between January 28 and March 2. (Three of these new employees soon quit and the remaining eight were laid off March 12.) The Company also rehired a former employee, Mary Blanford, who had not worked at the plant since the union organizing began. (See G.C. Exh. 32.)

Plant Manager Tunstall claimed that three of the laid-off employees were recalled. He testified that Blanford returned at her previous wages, that Martha Nally refused to return in a lower classification, and that another employee returned and worked only 1 day (at a reduced rate of pay). However Blanford, the only person who was offered a job without a reduction in pay, was not one of the laid-off employees, all of whom, if they had been recalled, would have been offered the new 1981 wage scale (G.C. Exh. 42).

This new wage scale, which was unilaterally adopted and made effective January 1, replaced the prior wage scale, grades, and ranges (G.C. Exhs. 41 and 47), generally lowering the wages as discussed above under "Layoff or discharge" (concerning the layoff of Conder, Brooks, and Stevens). All of the employees who had remained on the payroll were permitted to retain their current wage rates unchanged. However, as found, the Company discriminatorily applied the new, lower wage scale to Conder, Brooks, and Stevens as a maneuver to enable it to claim it believed they would not want to return at the lower wage. One supervisor, though, admitted at the hearing (contrary to Tunstall's false testimony) that he and Tunstall had decided not to recall any of the laid-off employees (presumably after Nally and another employee had been recalled, if that part of Tunstall's testimony can be believed).

#### c. Contentions of the parties

The General Counsel contends that the Company's unilateral changes on October 31 were separate unlawful refusals to bargain (and were also unlawfully motivated to discourage union membership and activity, for which I find no supporting evidence). He contends that the layoffs on December 5 and thereafter, and the changes in wages and rates of pay, all made unilaterally and without affording the Union "prior notice or an opportunity to bargain about the method" of layoffs or about the wage changes, were additional separate violations of the duty to bargain. He contends that the Company, without affording the Union notice or opportunity to bargain, "conditioned" recall of the laid-off employees on their acceptance of the new wages and "failed and refused to recall employees who would not accept, or who the Respondent believed would not accept," the new wages.

The Company denies any obligation to bargain. It admits that Plant Manager Tunstall "announced the implementation of policies on job bidding, absenteeism, layoff," etc., but denies that the Company took this action, as the "General Counsel alleges," to discourage employees from joining and assisting the Union. It ig-

nores the further allegation that the Company instituted these changes "unilaterally, and without affording the Union prior notice or an opportunity to bargain" over the changes, as alleged in the February 26 complaint, amended March 4.

Concerning the unilateral changes, the Company argues that if it had "delayed its changes or forestalled any action pending discussion or agreement with a union which to [its] knowledge and belief did not represent a majority of its employees, its business might very well have gone under completely" (without supporting evidence). "If an employer both during and after an election campaign has the threat hanging over his head that any unilateral action taken by him in the operation of his business may later be ordered set aside, it may hesitate to so act and as a consequence its business may suffer. On the other hand if it attempts to avoid 8(a)(5) violations by bargaining over contemplated changes with a union seeking recognition it risks an 8(a)(2) violation should it be found that the union is but a minority representative" (without citing any authority).

#### d. Concluding findings

Any uncertainty the Company may have had about its obligation to bargain after the election was of its own making. Having committed flagrant unfair labor practices to prevent a fair election, it acted at its peril in unilaterally making the October 31 changes in conditions of employment, in unilaterally adopting the changed method of selecting the large number of employees for layoff (thereby changing the conditions of employment of bargaining unit employees), in unilaterally adopting the changes in wage scale, grades, and ranges while exempting the employees remaining on the payroll from the reductions, and in depriving the laid-off employees of recall by unilaterally adopting the new recall policy.

I therefore reject the Company's contentions and find that its unilateral actions constituted separate violations of its duty to bargain which arose July 31.

### III. REPRESENTATION PROCEEDING

The petition was filed by the Union on August 4. The election, directed by the Regional Director, was conducted October 1. The vote was 51 for and 74 against union representation, with 3 challenged ballots, an insufficient number to affect the outcome of the election. The Union filed timely objections.

Based on the foregoing findings of unfair labor practices committed by the Company during the critical period from August 4 to October 1, I find that the Company engaged in serious misconduct which interfered with the employees' exercise of a free and uninhibited choice of representation.

Concerning the alleged violation of the *Excelsior* rule, *Excelsior Underwear, supra*, 156 NLRB 1236, the Company submitted a list (C.P. Exh. 1) which was obviously designed to deprive the Union of an opportunity to contact the eligible voters. The names and addresses were not listed alongside each other, but were listed separately, with the names typed on 2-1/2 pages and the addresses typed on six pages. This is the only list which U.I.U.

General Organizer Ted Davis received, and it is the list which was used at the election.

The Company contends that it hand delivered a second list (Resp. Exh. 4), with the addresses listed alongside the names, to the desk clerk at the motel where Davis was staying. It relies on the testimony of the former acting plant manager, Bruce Williams, who claimed that he handed it to the desk clerk for Davis, without asking the clerk to sign for it. (As found above, Williams placed a spurious final written warning memo in union organizer Adams' file to justify his discharge.) I agree with the Company that it established the motel's business practice and custom in handling deliveries of mail and packages addressed to patrons of the motel, and that Davis conscientiously picked up his mail. Therefore, if Williams had in fact delivered the second list to the desk clerk, Davis undoubtedly would have received it.

As indicated above, however, Williams did not impress me favorably as a witness and I discredit his testimony that he delivered the second list. I therefore find that the Company violated the *Excelsior* rule as alleged.

Accordingly I find that the October 1 election must be set aside.

### CONCLUSIONS OF LAW

1. By discharging Thomas Muensterman November 20 and William Adams, Jr., March 2, and by discriminatorily laying off Susan Brooks, Richard Conder, and Mary Stevens December 5 and refusing to recall them since that date, because of their support of the Union, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By denying Williams Adams, Jr., a scheduled wage increase October 3, by placing spurious disciplinary warnings in his file dated November 2 and December 12, and by giving Richard Conder a written warning November 4 and a 3-day suspension November 7, the Company violated Section 8(a)(3) and (1).

3. By making repeated threats to close the plant if the employees voted for union representation, the Company violated Section 8(a)(1).

4. By engaging in repeated coercive interrogation and by creating the impression that the employees' union activities were under surveillance, the Company violated Section 8(a)(1).

5. By promising the principal union organizer a promotion to foreman if he would help defeat the Union, the Company violated Section 8(a)(1).

6. By soliciting employee grievances and making an implied promise of a remedy, the Company violated Section 8(a)(1).

7. By maintaining a rule prohibiting union solicitation during working hours and prohibiting the distribution of union literature on company premises without specific prior approval, the Company violated Section 8(a)(1).

8. By refusing to bargain on and after July 31, the Company violated Section 8(a)(5) and (1).

9. By unilaterally eliminating the job bidding procedures and by unilaterally changing the seniority-layoff system and the absentee and attendance program on Oc-

tober 31, thereby changing conditions of employment, the Company violated Section 8(a)(5) and (1).

10. By unilaterally laying off a large part of the bargaining unit between December 5 and March 12, using the new layoff standards, without affording the Union an opportunity to bargain about the method of the layoffs, the Company violated Section 8(a)(5) and (1).

11. By unilaterally changing the wage scale, grades, and ranges, effective January 1, the Company violated Section 8(a)(5) and (1).

12. By unilaterally conditioning the recall of laid-off employees upon their acceptance of the new wages and by failing and refusing to recall them, the Company further violated Section 8(a)(5) and (1).

13. The Company did not threaten to discharge employees if they supported the Union.

14. The Company did not engage in unlawful surveillance, discriminatorily restrict employees to their work station or department, or unlawfully restrict their talking during working time.

15. The General Counsel failed to prove that the Company coercively gave an employee antiunion literature to distribute, threatened to discontinue pay raises if they selected the Union, or made an additional alleged threat of plant closure.

16. The General Counsel failed to prove that the Company violated the Act by eliminating certain smoking areas or that it was discriminatorily motivated when making the unilateral October 31, 1980, changes in working conditions.

17. The General Counsel failed to prove that the October 24, 1980, disciplinary warning given William Adams, Jr., was unlawfully motivated.

18. The General Counsel failed to make a *prima facie* case that union organizer Rick Poore's August 1, 1980, discharge was discriminatorily motivated.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged two employees and discriminatorily laid off and refused to recall three others, I find it necessary to order it to offer them reinstatement and make them whole for lost earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of

reinstatement, less any net interim earnings, in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Because of (1) the failure of the Respondent to bargain with the Union concerning the method of making the numerous layoffs, (2) the unilateral changing of their wages, (3) the unilateral conditioning of their recall upon acceptance of the unlawfully reduced wages, and (4) the failure to recall them while hiring new employees, I find it necessary to order the Respondent to offer reinstatement to all bargaining unit employees laid off on or after December 5, 1980, at their former rates of pay, dismissing, if necessary, persons hired after that date, and, if sufficient jobs are not available, to place the remaining laid-off employees on a preferential hiring list doing so, at the request of the Union, in accordance with the seniority system in effect before the October 31, 1980, unilateral changes, and offer them employment before any other persons are hired. In view of the Respondent's financial losses at the time, I agree with the General Counsel that it is not appropriate under the circumstances of this case to provide for the customary backpay. Cf. *Clements Wire & Manufacturing Company, Inc.*, 257 NLRB 1058 (1981).

The Respondent having made unilateral changes in working conditions on October 31, 1980, and made unilateral changes in wages effective January 1, 1981, notwithstanding its duty to bargain since July 31, 1981, I find that the unlawful refusal to bargain can be remedied only by restoration of the *status quo ante*. I therefore find it necessary to order the Respondent, upon the Union's request, to rescind these changes and restore the job bidding procedures, seniority system, absentee and attendance program, and the wage scale, grades, and ranges which were in effect before the unilateral changes were made. I also find it necessary to order the Respondent to mail the required notice to all employees laid off on and since December 5, 1980.

As it appears that the Respondent has engaged in such egregious misconduct as to demonstrate a general disregard for the employees' fundamental rights, I find it necessary to issue a broad order, requiring the Respondent to cease and desist from infringing in any other manner upon rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]